No. 86-1782

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In The
Supreme Court of the United States
October Term, 1986

BLACK HILLS POWER AND LIGHT COMPANY, a South Dakota corporation, and SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and the STATE OF SOUTH DAKOTA,

Petitioners

vs.

CASPAR W. WEINBERGER, et al.,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER A. TELLINGHUISEN
Attorney General of the State of South Dakota
MARY VANDERPAN (attorney of record)
General Counsel for South Dakota Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57501
Attorneys for Petitioner Public Utilities Commission and State of South Dakota
(605) 773-3202

DAVID E. MORRILL *(attorney of record)*
MORRILL & BROWN
P. O. Box 8108
Rapid City, South Dakota 57709-8108
Attorney for Petitioner Black Hills Power and Light Company
(605) 348-7516

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTION PRESENTED FOR REVIEW

Is state authorized regulation of electric utility service to Department of Defense facilities both on and off federal enclaves by state public utility regulatory commissions in conflict with federal law and regulations, including the Federal Power Act, the Public Utilities Regulatory Policies Act, regulations in force since 1974 requiring armed services procurement officers to comply with state regulation and a 1986 Congressional Act which prohibits the use of federal funds to implement or enforce new rules which would have required federal agencies to ignore state regulation?

PARTIES TO THE PROCEEDING

1. Black Hills Power and Light Company, Petitioner (Black Hills); 2. South Dakota Public Utilities Commission and the State of South Dakota, Petitioner (PUC); 3. Caspar W. Weinberger as Secretary of the Department of Defense, Respondent; 4. The Department of Defense, an agency of the United States of America, Respondent; 5. Richard D. Rasmussen as Contracting Officer for Ellsworth Air Force Base, Respondent; 6. Heartland Consumers Power District, a subdivision of the State of South Dakota, Respondent (Heartland); and 7. West River Electric Association, Inc., a South Dakota rural electric cooperative, Respondent (WREA).

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Three tribunals have rendered opinions in this matter, the South Dakota Public Utilities Commission, the United States District Court for the District of South Dakota, Western Division and the United States Court of Appeals for the Eighth Circuit. Neither the Public Utilities Commission opinion nor the United States District Court opinion were reported. Both opinions are set forth verbatim in the Appendix. The United States Court of

Appeals for the Eighth Circuit opinion is reported at 808 F.2d 665 (8th Cir 1987).

JURISDICTIONAL GROUNDS

The judgment of the Eighth Circuit sought to be reviewed in this matter is dated January 7, 1987 and is filed on February 20, 1987. Black Hills and the PUC petitioned for rehearing and suggested hearing in banc, both of which were denied by the Eighth Circuit on *February 4, 1987*. Jurisdiction in this Court to review the judgment of the United States Court of Appeals for the Eighth Circuit is conferred on this Court by 28 U.S.C. 2101(c).

CITATIONS TO PERTINENT AUTHORITY

Following is a list of citations to pertinent authority, the text of some of the authority being set out verbatim in the Appendix pursuant to Supreme Court Rule 21.1(f) because of the lengthy nature of the provisions:

1. Air Force FAR Supplement 8.304-91: 8.304-91 Competition. The contracting officer shall determine by market survey if more than one supplier can furnish needed public utility services for proposed procurements prior to using other than competitive procedures. The existence of franchised service territories established by state or local governmental entities does not in and of itself restrict acquisition of public utility services to a sole source. The contracting officer need not enter into a contract with the state or locally franchised public utility supplier simply because the supplier has obtained the local franchise. The contracting officer should instead seek to competitively acquire public utility services whenever possible.

2. 51 Fed. Reg. 16988-16991 (May 7, 1986) (reprinted in Appendix)

3. P.L. 99-591 § 620, 100 Stat. 3341-333, (99th Cong. Oct. 30, 1986): Sec. 620. None of the funds appropriated

or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Federal Register 16988-16991), or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas, or steam utility services acquired by the Federal Government.

4. P.L. 99-591 § 9111, 100 Stat. 3341-120 (99th Cong. Oct. 30, 1986): Sec. 9111. None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991), or section 8.304-91 of the Air Force FAR Supplement issued on June 24, 1985.

5. Arms Services Procurement Regulation Supplement No. 5, dated as of October 1, 1974, incorporated at 48 C.F.R. § 208.3 (selected portions reprinted in Appendix)

6. U.S. Const. Art. 1, § 8, Cl. 17: To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

7. 40 U.S.C.S. § 255, 6th unnumbered paragraph (1978 Supp.): Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over

any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This action originated when Black Hills filed a complaint against Heartland with the South Dakota PUC asking that the PUC enjoin Heartland from performing a one year contract entered into with Ellsworth Air Force Base (EAFB), a military installation of the Air Force and Department of Defense, to provide overrun electric power. Black Hills complained that Heartland did not have authority to serve at retail outside of its boundaries and that Black Hills was entitled to serve EAFB under the state regulatory law granting franchised areas for retail service. The PUC conducted a three day evidentiary hearing in which the United States through EAFB participated. The PUC entered a decision and order, which is reproduced in the Appendix, and found that electric service to EAFB was service at retail and Heartland did not have authority to serve EAFB. The PUC also ruled that under applicable state law and the federal procurement regulations governing utility acquisition, Supplement No. 5, which is reproduced in the Appendix, Black Hills was entitled to be the sole supplier of electric service to EAFB other than that furnished by the United States. EAFB refused to comply with the PUC order. Black Hills then brought an action in the United States District Court for the District of South Dakota, Western Division, Civ. No. 5031, to force EAFB and the applicable government

officers to comply with the PUC order. While this action was pending, Heartland, WREA and the United States appealed from the PUC decision to the Sixth and Fourth Judicial Circuit Courts of South Dakota. The United States petitioned to remove those appeals to the United States District Court in Civ. Nos. 85-4068 and 85-3015. The United States also commenced a United States District Court action against the PUC seeking an injunction in Civ. No. 85-5064. All the foregoing cases were consolidated with Black Hills' action, Civ. No. 5031. The District Court in Civ. No. 5031 denied Black Hills' motion for summary judgment in the consolidated action, granted the United States' motion to dismiss, dismissed as moot the two appeals of the PUC decision and dismissed as redundant the action brought by the United States seeking an injunction against the PUC. Appeal was then taken to the United States Court of Appeals for the Eighth Circuit. The PUC as a named defendant in the original action cross appealed but filed briefs in support of Black Hills' position. The Eighth Circuit's opinion of January 7, 1987 affirmed the District Court judgment. Judgment of the Eighth Circuit was filed February 20, 1987. Black Hills' and the PUC's petition for rehearing and in banc was denied on February 4, 1987.

Jurisdiction in the District Court action brought by Black Hills in Civ. No. 5031 was invoked on the grounds that the relief sought by Black Hills was in the nature of mandamus against a federal officer or agency as provided at 28 U.S.C. § 1361 and that there existed a question which arose under federal statutes and regulations giving the Court jurisdiction under 28 U.S.C. § 1331. The action brought by the United States against the PUC which was consolidated with Black Hills' action Civ. No. 85-5031 also gave the Court further jurisdiction under 28 U.S.C. § 1345.

Statement of the Facts

In 1984 EAFB, a federal military installation located in Meade and Pennington Counties in South Dakota, requested proposals for electric service supplemental to that being received by EAFB from Black Hills and the Western Area Power Administration (WAPA). Black Hills has served, and still does, a portion of EAFB, Renel Heights, for many years, including electric service on March 21, 1975 the date on which the territory comprising EAFB was divided by the PUC as assigned service areas between Black Hills and WREA. Black Hills submitted the only proposal it could legally make based upon rates as approved by the PUC. The one year contract for supplemental power was awarded to Heartland. The contract was renewed for another year and in 1986 Basin Electric, a rural electric generation and transmission cooperative from North Dakota, was awarded a one year contract.

Black Hills protested the awarding of the contract to Heartland contending that Heartland was not a qualified bidder because it did not have statutory authority to supply electric service to EAFB; that the sale to EAFB was a sale at retail and Heartland had no power to sell at retail beyond its district; and that Black Hills should be the sole supplier of electric service to EAFB other than government purchased electric power. Black Hills' protest was denied by EAFB's contracting officer, the defendant Rasmussen. Black Hills then filed a complaint against Heartland with the PUC. After an evidentiary hearing, the PUC entered a decision and order including findings of fact and conclusions of law, finding among other things, that: (1) the sale of electricity to EAFB was a retail sale; (2) Black Hills was the only supplier other than the United States providing electric service to EAFB on March 21, 1975, the date on which South Dakota electric territory law granted electric utilities the right to continue to serve existing customers; and (3) only a portion, approximately 88%, of EAFB is a federal enclave. Those portions of EAFB which are not

part of a federal enclave include the Skyway housing area, Capehart housing area, part of the hospital, the security gate and parts of the runway. The PUC also found that Black Hills was able to serve EAFB by three different methods.

ARGUMENT FOR ALLOWANCE OF WRIT

I. This is an important question of federal law which should be settled by this Court.

In this case the Eighth Circuit decided an important question of federal law which has not been but should be settled by this Court. The Eighth Circuit effectively destroyed the long standing state/federal dichotomy in the area of regulation of electricity as evidenced by federal statutes such as the Federal Power Act, 16 U.S.C. § 824 *et seq.*, including the Public Utilities Regulatory Policies Act of 1978 (PURPA). The cases relied upon by the Eighth Circuit involved such things as the regulation of milk sales and truck transportation services, not electric utility service which is a heavily federal and state regulated area with a long standing natural dichotomy in jurisdiction.

The importance of this question and Congressional recognition of the federal/state dichotomy in the regulation of electricity is recognized and evidenced by the legislative history in the passage of the new legislation referred to in the Question Presented above, House Joint Resolution 738 (P.L.99-500, resubmitted and signed into law by President Reagan on October 30, 1986 as Public Law 99-591.) Certain sections of Public Law 99-591 were promulgated as a result of proposed federal regulations concerning the acquisition of utility services and a similar Air Force supplemental regulation. After Black Hills had commenced this action complaining to the PUC that EAFB was not purchasing electricity from the state franchised utility as required by applicable law, and a favorable ruling by the PUC in favor of Black Hills, the Air Force adopted without notice in the Federal Register section

8.304-91 of its regulations, which is reproduced, *supra*, and the Department of the Defense and other agencies proposed in the May 7, 1986 Federal Register 51 Fed. Reg. 16988-16991, regulations, which are reproduced in the Appendix, which would direct federal procurement officers not to follow state utility franchise law in determining the applicable suppliers of electric utility services to military installations. As a result of the notice of the proposed regulations in the Federal Register and the request for comments thereon, the 99th Congress in the fall of 1986 passed the following two laws as part of the Appropriations Bill, P.L. 99-591, the second one for the Department of Defense:

> None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991), or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas, or steam utility services acquired by the Federal Government. Section 620 of HR 5294 adopted by reference by House Joint Resolution 738, now § 620, Public Law 99-591, 100 Stat. 3341-333 (Oct. 30, 1986).
>
> None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991), or Section 8.304-91 of the Air Force FAR Supplement issued on June 24, 1985. Section 9108 of HR 5438 adopted by reference by House Joint Resolution 738, now § 9111, Public Law 99-591, 100 Stat. 3341-120, (Oct. 30, 1986).

The legislative history behind the passage of Public Law 99-591 and the sections quoted above demonstrates the importance of this question as follows:

> The May 7, 1986 proposal raises serious problems as well with respect to the fundamental regulatory scheme which has applied for the last 50 years to the sale and distribution of electricity. Under the Federal Power Act of 1935 (16 U.S.C. § 824 *et seq.*) and subsequent legislation such as the Public

> Utility Regulatory Policies Act of 1978, Congress has exerted exclusive jurisdiction over sales of electricity for resale in interstate commerce while at the same time expressly reserving to the states authority to regulate the retail sale and distribution of electricity. H.R. Report No. 99-723, § 620 at 80, 99th Cong., 2d Sess. (1986).

The House of Representatives Report further recognized that:

> The autonomy of the states in this area has historically been preserved by federal statute. The proposed rules disregard state authority over retail electric sales by directing federal contracting officers to ignore state-created utility service territories when procuring electric service. In effect the rule proposes to dismantle the current, long established regulatory system by permitting the Federal Government, the nation's largest single electricity consumer, to disregard the rules governing all other participants in the heavily-regulated market for retail electric service. H.R. Report No. 99-723, 99th Cong., 2d Sess. § 620 at 80 (1986).

The Eighth Circuit's opinion below allows the federal government to do exactly what Congress was concerned about in the passage of the provisions of Public Law 99-591 quoted above. The opinion concluded that notwithstanding the above legislative history and legislation directing that regulations requiring competitive purchasing of electric service not be followed, the Department of Defense can ignore state franchised territory regulation and purchase electricity competitively. The Eighth Circuit correctly asserted that the new legislation contained in P.L. 99-591 reaffirmed Supplement No. 5, in force since October 1, 1974, as the applicable law regarding the procurement of electric utility service but determined that the supplement did not advance petitioner's position because of an erroneous conclusion that Supplement No. 5 did not require the federal government to defer to state regulation.

That determination is inconsistent with the passage of the new legislation and moreover blatantly ignores and disregards the Congressional intent inherent in the passage of Public Law 99-591. The Eighth Circuit interpreted Supplement No. 5 as allowing competition in the procurement of utility services just as the May 7, 1986 proposal and Air Force Supplement § 8.304-91 allow competition. Congress, however, in passing Public Law 99-591, *prohibited* the use of funds in the implementation of the May 7, 1986 proposal or § 8.304-91 of the Air Force Supplement. The only intent that can be ascribed to the passage of Public Law 99-591 is that Congress is interpreting the federal law and federal regulations including Supplement No. 5, as mandating the acquisition of utilities services for the federal government from state franchised utilities. Otherwise, the passage of the new legislation would be meaningless. If it were Congress' intent that Supplement No. 5 could be construed to allow the competitive procurement of electric services, why would Congress pass Public Law 99-591? It is well established that subsequent legislation can provide meaning to previous legislation. See *Andrus v. Shell Oil Company* 446 U.S. 657, 665 n. 8 (1980) ("[W]hile arguments predicated upon subsequent Congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent"). That Congress intends that the federal government should follow state franchise territory was made clear in the legislative history of Public Law 99-591:

> The Committee believes that the Federal Government as an electric consumer should abide by state franchise territory restrictions and regulatory authority over retail electric rates and service. § 620 precludes the promulgation, implementation, and enforcement of rules that would permit the Federal Government to escape these limitations. H. R. Report No. 99-723, 99th Cong., 2d. Sess., § 620 at 80 (1986).

The effect, then, of the Eighth Circuit's opinion is to allow the Federal Government to ignore state franchise territories in the acquisition of electric utility service in direct violation of Congressional intent in the passage of Public Law 99-591 as evidenced in the legislative history.

The opinions below have had a great impact in the electric industry throughout the nation, have been highly publicized and are being followed in every trade journal of that industry. When the federal government can purchase utility service competitively, but the individual household cannot, the household subsidizes the federal government. Nearly every consumer in the United States is affected by this decision. In light of the new legislation and legislative history showing Congressional intent that the federal government should not ignore state franchised utilities when procuring electric service, and the importance of a national policy regarding the procurement of utility services by the federal government, it is evident that the question decided by the Eighth Circuit is an important and substantial federal question and should be reviewed by this Court.

II. Conflict with previous opinions

A. Conflict with other Court opinion regarding procurement regulations.

The decision of the Eighth Circuit is in direct conflict with a lower court opinion which was subsequently affirmed without opinion by the United States Supreme Court. In *United States v. State Corporation Commission of Virginia*, 345 F. Supp. 843 (1972), affirmed without opinion 409 U.S. 1094 (1973), the 3 judge panel United States District Court for the Eastern District of Virginia held that the Virginia State Corporation Commission could regulate telephone service to the Pentagon, a federal

enclave.[1] The United States had argued that such regulation would violate the Supremacy Clause of the United States Constitution. The District Court disagreed based in part on Armed Forces' Procurement Regulations with similar language to Supplement No. 5. The regulations quoted in *State Corporation Commission* provided that:

> In accordance with instructions contained in Department of Defense directives ... *the Department of Defense generally procures communication services ... in accordance with tariff provisions, and tariff rates established ... with ... appropriate governmental bodies* unless cause for other operational requirements dictate otherwise. [emphasis in original]. *Id.* at 847.

This language is strikingly similar to that contained in Supplement No. 5 at S5-103.2(a): "The Department of Defense procures utility services from industries which are, to a greater or lesser extent, regulated by federal, state and local regulatory bodies." The 3 member panel District Court stated that:

> The Supreme Court has continued to require a showing, in Supremacy cases, that the constitutionally questioned state law or regulation conflicts with federal statute or policy. [citations omitted] ...
>
> We find no relevant Federal statute that conflicts with the 1971 State Corporation Commission order.
>
> We find, furthermore, that there is no discernible Federal policy relevant to procurement of telephone services that would be offended by enforcement of the Virginia State Corporation Commission order as to the Government and in fact, recognition of the Virginia tariff is, and has

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[1] The fact that the Pentagon was a federal enclave is clear in the government's Jurisdictional Statement filed with the court in the appeal from the District Court.

been, the Government policy. *Id.* at 847.

This Court's affirmance of the District Court judgment at 409 U.S. 1094 is binding upon lower courts. "[L]ower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.' *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). The District Court and the Eighth Circuit both ignored *State Corporation Commission* and cited instead state cases such as *Re Souris River Telephone Mutual Aid Corporation*, 24 P.U.R. 3d 84 (1958) and *Arkansas Power and Light Company v. Arkansas Public Service Commission*, 330 S.W. 2d 51, cert denied 362 U.S. 975 (1960), both of which were decided before the promulgation of Supplement No. 5. As the Supreme Court in *Hicks, supra*, indicated, however, the decision in *State Corporation Commission* was binding on these lower courts.

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions . . .

Mandel v. Bradley, 432 U.S. 173, 176 (1977).

In determining the precedential value then of a summary affirmance, the jurisdictional statement should be examined. See *Mandel, supra*, 432 U.S. at 180 (Brennan, J., concurring). The Question Presented in the Jurisdictional Statement submitted by the Department of Justice on behalf of the United States in *State Corporation Commission* above is as follows:

> Whether the State Corporation Commission of the Commonwealth of Virginia has unconstitutionally negated a federal contract and federal procurement policy by requiring an increase in the rates which the United States pays for telephone service

> at the Pentagon and other military installations in the Washington metropolitan area of northern Virginia. *Jurisdictional Statement*, No. 72-723, p. 2, (1972).

In support of its argument that this Court should reverse the District Court, the United States also argued that:

> In addition, Article I, § 8, Cl. 17, of the Constitution provides that 'the Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings.' In *Paul v. United States*, *supra*, 371 U.S. at 263, this Court declared that 'the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, Cl. 17, by its own weight, bars state regulation without specific congressional action.' This Court further stated (371 U.S. at 264) that the jurisdiction of the federal government is also 'exclusive' when the government acquires land for the purposes of Clause 17. In addition, as the Court noted (371 U.S. at 265), in giving the 'consent' to the goverment's acquisition of land for purposes set forth in Clause 17, 'a State may condition its 'consent' upon its retention of jurisdiction, over the lands consistent with the federal use.
>
> The application of the foregoing principles to the federal reservation at the Pentagon was not developed in the record below although we believe that point was preserved (Motion to amend complaint. Transcript of Proceedings of May 19, 1972, page 27). The statutes and public records, however, indicate that the federal government has 'exclusive' jurisdiction over the Pentagon that precludes any state regulation of telephone rate service there, because Virginia gave its 'consent' to the federal government's acquisition of the Pentagon for land

> for Clause 17 purposes without any reservation of jurisdiction to enact such regulations . . .
>
> In view of the foregoing, we suggest that, as in *Paul v. United States*, *supra*, 371 U. S. at 245, if the Court should find that our contentions based on the Supremacy Clause do not suffice to require the relief sought, it would be appropriate to remand the case to the District Court to develop the facts pertinent to this additional constitutional issue. *Jurisdictional Statement* 13-15.

It is evident then that this Court was presented in *State Corporation Commission* the enclave issue in conjunction with federal procurement regulations which are strikingly similar to those involved here contained in Supplement No. 5. The communication regulations involved in *State Corporation Commission* as they existed at the time of the appeal provided in 22-1003 *Policy* as follows:

> [T]he Department of Defense generally procures communication services of the kind offered by common carriers, including equipment and facilities incidental to those services, from common carriers in accordance with tariff provisions, and at tariff rates established with the Federal Communications Commission (FCC) or with other appropriate governmental regulatory bodies unless cause for operational requirements dictate otherwise.

Supplement No. 5 provides similarly at S5-103.2(a) that: "The Department of Defense procures utility services from industries which are, to a greater or lesser extent, regulated by Federal, state and local regulatory bodies." Under 22-1005 *Sources for Communication Services* of the procurement regulations involved in *State Corporation Commission*, it is provided that:

> (a) Generally communication services shall be procured from the communication common carrier authorized by the appropriate regulatory body to operate within the service area in which the ser-

vices are required.

(b) Although normally only one carrier is authorized to provide a specific type of service in any given location, there are locations at which no single communication common carrier has the exclusive right to provide the required service. When this is the case and more than one common carrier is authorized and can provide the required service, the procurement shall be made from the source offering the lowest cost to the Government, if practicable . . .

United States v. State Corporation Commission of Virginia, Motion to Dismiss or Affirm, No. 72-723 Appendix A, p.4-5 (1972).

This language in the telecommunications procurement regulations is nearly identical to that contained in Supplement No. 5 at S5-104.1(a):

Although in most instances utility service suppliers operate in franchise territory, competition may nevertheless exist - for example, where more than one supplier is franchised for a given location, or where more than one supplier is able to provide service at a given location but no supplier has yet been franchised for that location. Therefore, when the location of a new military installation has been determined and the procurement of utility services is authorized, the contracting activity shall determine whether more than one supplier can provide the service. Where competition exists, proposals shall be solicited from all potential suppliers . . .

Accordingly, it is evident that this Court has already made a decision in the *State Corporation Commission* case on the issue of whether the enclave clause would bar state regulation of the federal government when federal procurement regulations show a federal policy of compliance with state law regarding the procurement of services. As the attorney for appellees said in their Motion to Dismiss the United States' appeal in *State Corporation Commission:*

> Here we have a purchase of telephone service pursuant to a clearly defined and universally employed Federal policy fully consistent with State law. The Federal policy being applicable, the new issue of 'exclusive' jursidiction now raised by the Government can have no effect on this case. *Motion to Dismiss or Affirm*, No. 72-723, p. 12 (1972).

The United States District Court for the District of South Dakota and the Eighth Circuit, being bound by the *State Corporation Commission* case, should have ruled that the federal procurement regulations, Supplement No. 5, evidenced a federal policy of compliance with state law despite the fact that EAFB is a partial federal enclave under the authority of *State Corporate Commission*. Because the lower courts involved here did not make such a decision, their decisions are in conflict with a decision of this Court.

B. Conflict with previous federal enclave decisions.

The Eighth Circuit's opinion is also in conflict with previous decisions of this Court. The Eighth Circuit extended federal jurisdiction beyond the boundaries of a federal enclave. As delineated in the statement of facts above, only 88% of EAFB is on a federal enclave. As to the other 12%, jurisdiction was never accepted by the federal government pursuant to 40 U.S.C. §255. Under *Adams v. United States*, 219 U.S. 312 (1943), the federal government has no jurisdiction over that 12% of EAFB upon which it did not give the notice required by 40 U.S.C. § 255. In *Adams*, the Supreme Court construed 40 U.S.C. § 255 as a prerequisite to the federal government's acquisition of any type of jurisdiction. The Court in discussing the statute said that:

> The Act [40 U.S.C.A. § 255] created a definite method of acceptance of jurisdiction so that all persons could know whether the government had ob-

> tained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction.' . . .
>
> The Department of Justice has abandoned the view of jurisdiction which prompted the institution of this proceeding, and now advises us of its view that concurrent jurisdiction can be acquired only by the formal acceptance prescribed in the Act . . . Since the government had not accepted jurisdiction in the manner required by the Act the federal court had no jurisdiction of this proceeding.

Here, as set forth above, the federal government has not noted acceptance of jurisdiction pursuant to the provisions of 40 U.S.C. 255 on approximately 12% of EAFB. That 12% includes Skyway Housing, Capehart Housing, part of the hospital, the security gate and parts of the runway. In the absence of an acceptance of either partial or exclusive jurisdiction, the United States' possession of lands is that of an ordinary proprietor. *Paul v. United States*, 371 U.S. 245, 264 (1963). Accordingly, it is evident that as to the portion of EAFB that is not an enclave, the state of South Dakota has jursidiction and Black Hills should be entitled to serve those portions of EAFB, as the PUC has determined that under South Dakota franchise territory law, Black Hills is entitled to be the sole supplier.

WHEREFORE, your petitioners would respectfully request that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

ROGER A. TELLINGHUISEN
Attorney General of the State of South Dakota
MARY VANDERPAN (attorney of record)
General Counsel for South Dakota Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57501
Attorneys for Petitioner Public Utilities Commission and State of South Dakota
(605) 773-3202

DAVID E. MORRILL *(attorney of record)*
MORRILL & BROWN
P. O. Box 8108
Rapid City, South Dakota 57709-8108
Attorney for Petitioner Black Hills Power and Light Company
(605) 348-7516

APPENDIX

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In The
United States Court of Appeals
For the Eighth Circuit

No. 85-5418

Black Hills Power and Light Company, A South Dakota Corporation,

Appellant,

v.

Caspar W. Weinberger, as Secretary of the Department of Defense; Department of Defense, an agency of the United States of America; Richard D. Rasmussen, as contracting officer for Ellsworth Air Force Base, a defense installation under the control of the Department of Defense; Heartland Consumers Power District, a subdivision of the State of South Dakota; West River Electric Association, Inc., a South Dakota rural electric cooperative; and the Public Utilities Commission, a regulatory commission of the State of South Dakota,

Appellees.

Black Hills Power and Light Company,

Appellant,

v.

Heartland Consumers Power District, Ellsworth Air Force Base, United States of America,

Appellees.

Black Hills Power and Light Company,

Appellant,

v.

Heartland Consumers Power District, Ellsworth Air Force Base, United States of America,

Appellees.

Appeal and Cross-Appeal from the United States District Court for the District of South Dakota.

No. 85-5428

Black Hills Power and Light Company, A South Dakota Corporation,

Appellee,

v.

Caspar W. Weinberger, as Secretary of the Department of Defense; Department of Defense, an agency of the United States of America; Richard D. Rasmussen, as contracting officer for Ellsworth Air Force Base, a defense installation under control of the Department of Defense; Heartland Consumers Power District, a subdivision of the State of South Dakota; West River Electric Association, Inc., a South Dakota rural electric cooperative; and the Public Utilities Commission, a regulatory commission of the State of South Dakota,

Appellant.

Black Hills Power and Light Company,

v.

Heartland Consumers Power District, Ellsworth Air Force Base; USA.

Black Hills Power and Light Company,

v.

Heartland Consumers Power District, Ellsworth Air Force Base, United States of America.

Appeal and Cross-Appeal from the United States District Court for the District of South Dakota.

Submitted: June 9, 1986
Filed: January 7, 1987

Before JOHN R. GIBSON and MAGILL,
Circuit Judges, and REGAN,*
Senior District Judge.

JOHN R. GIBSON, Circuit Judge.

Black Hills Power and Light Company and the South Dakota Public Utilities Commission appeal from a judgment of the district court denying Black Hills' motion for a preliminary injunction and summary judgment and granting the United States' motion to dismiss. Appellants seek to have a contract for electric power entered into by Ellsworth Air Force Base and Heartland Consumers Power District declared void, and an order entered requiring Ellsworth to contract with Black Hills for the provision of such power. The central issue on appeal is whether Ellsworth Air Force Base must follow the utility franchise territories prescribed by South Dakota law in procuring its electrical service. We conclude that Ellsworth is a federal enclave under exclusive federal jurisdiction, that nothing in federal procurement law directs the Ellsworth contracting officials to follow state utility franchise law, and that none of the legislation enacted by Congress while this case was pending alters our analysis and decision. Therefore, we affirm the decision of the district court.[1]

Ellsworth Air Force Base is a military installation of the Department of Defense and is located in parts of Meade and Pennington Counties, South Dakota. It occupies 4,856.76 acres, of which approximately 88% (4,261.57 acres) has been ceded by South Dakota to the exclusive jurisdiction of the United States.

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*The HONORABLE JOHN K. REGAN, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

[1]The Honorable Andrew W. Bogue, Senior United States District Judge for the District of South Dakota, Western Division.

Black Hills is a South Dakota electric utility regulated by the South Dakota Public Utilities Commission. It provides electric service to the Renel Heights housing area located on Ellsworth's main base. This service amounts to approximately 5.3% of Ellsworth's total electrical consumption. Prior to 1984, the rest of the main base needs, over 94% of Ellsworth's total electric consumption, were supplied by the Western Area Power Administration (WAPA), an agency of the United States Department of Energy. At two housing sites not connected to the main base, electricity is provided by West River Electric Association, a South Dakota rural cooperative. West River's service provides only .6% of Ellsworth's total needs. With the exception of the Renel Heights housing area, all electrical distribution, transmission, transformation, and street lighting systems located on Ellsworth are owned, operated, and maintained by the United States. The Renel Heights electrical system is owned by Black Hills and is not compatible with the WAPA-owned electrical system.

In 1984 WAPA determined that it could no longer supply all of Ellsworth's main base needs; thus, Ellsworth would have to contract with another supplier for the additional power The United States solicited bids and five suppliers, including Black Hills, submitted proposals. Ellsworth chose the lowest bid, that of Heartland Consumers Power District, a subdivision of the State of South Dakota. Heartland's proposal was $336,769.20 as compared to Black Hills' proposal of $614,381.19. The United States and Heartland entered into a one-year contract in October, 1984. On November 24, 1984, Black Hills filed a complaint with the South Dakota Public Utilities Commission arguing, among other things, that Ellsworth Air Force Base is located in Black Hills' utility service territory, and therefore Ellsworth is required to obtain electrical power beyond that supplied by WAPA from Black Hills.[2]

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[2] The Commission determined that because West River's service

(Footnote continued on the following page)

After a three day evidentiary hearing and a personal inspection of the Air Force base, the Commission issued its decision. It held that it had jurisdiction to determine who has the right to furnish electrical service to the base because, first it has jurisdiction to determine retail service areas of electric utilities, *see* S.D. Codified Laws Ann. §§49-34A-42 to 49-34A-44 (1983), and, second, although it does not have jurisdiction over the operations at Ellsworth, it has jurisdiction over the utility companies to determine who has the right to furnish the base with electricity. PUC Decision at 8. In addition, since part of the base was not ceded to the United States, that part is under the Commission's jurisdiction, and "in order to control the delivery of electric power and energy which is commingled and served throughout the entire Base, it is necessary for the Commission to control the whole." *Id.* Furthermore, the Commission determined that it was not interfering with federal jurisdiction because Congress has preempted regulation of wholesale sales of power and has left regulation of retail sales to the states. The Commission also decided that the federal procurement regulations direct federal procurement officers to abide by local franchise or service territories. Thus, the Commission concluded that federal law recognizes the Commission's jurisdiction to determine which electric utility has authority to deliver electric service to the base.

After deciding that it had jurisdiction, the Commission ruled that the sale of power to the United States is a retail sale, and Ellsworth is located primarily in Black Hills' service area. It concluded that, under South Dakota law, Black Hills is entitled to be the exclusive provider of electric service to Ellsworth for use at the base. *Id.* at 10.

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2 *(Continued)*

area encompassed a portion of the base, it was also a party to the proceedings. West River chose not to participate, but instead simply filed a letter with the Commission stating its position. As an appellee in the present case, West River adopts the arguments of Heartland and the United States.

Because the 1984-85 contract was awarded to Heartland as the lowest bidder, the Commission also discussed issues pertaining solely to Heartland's authority under state law to provide electric service to the base. However, the one-year contract beginning in October, 1986, was granted to Basin Electric Power Cooperative, a North Dakota entity that submitted a bid lower than Heartland's. Because the parties are requesting future injunctive relief rather than money damages, the issues concerning Heartland's authority are now moot.

Heartland, the United States, and West River appealed the Commission's decision to the South Dakota circuit courts, and the United States subsequently removed this appeal to the United States district court. In addition, Black Hills commenced an action for declaratory and injunctive relief, seeking to have the district court require that the United States contract with Black Hills for the provision of overrun power, and the United States brought an action seeking to enjoin the Commission from preventing the United States from using competitive procedures. The district court consolidated these four cases. *Black Hills Power & Light Co. v. Weinberger*, Civ. 85-5031, 85-3015, 85-4068, 85-5064, slip op. at 2-4 (D.S.D. Oct. 16, 1985). The court denied Black Hills' motions for a preliminary injunction and summary judgment and granted the United States' motion to dismiss. Slip op. at 15. The court dismissed as redundant the United States request for injunctive relief. *Id.* at 15-16.

The district court held that there was a conflict between state and federal law, and that the supremacy clause, U.S. Const., art. VI, cl. 2, prevented the Commission from forcing the United States to contract with a specified electric utility. Slip op. at 6-13. Additionally, the court concluded that the Commission lacks jurisdiction over Ellsworth Air Force Base because it is an exclusive federal enclave. *Id.* at 14. In the alternative, the district court concluded that the South Dakota utility statutes do not apply to the United States. *Id.* at 14-15.

I

Congress has the power "[t]o exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const. art. I, § 8, cl. 17. The grant of "exclusive" legislative power to Congress over federal enclaves, by its own weight, bars state regulation without specific congressional approval. *Paul v. United States*, 371 U.S. 245, 263 (1962). The importance of distinguishing between jurisdiction on state-owned land and on a federal enclave was articulated by the Supreme Court in *Pacific Coast Dairy , Inc. v. Department of Agriculture of California*, 318 U.S. 285 (1943). There, a California milk dealer attempted to prevent the California Department of Agriculture from revoking his license for selling milk to the War Department (now Department of Defense) at less than the minimum price fixed by state law. The sale and delivery took place on Moffett Field, federally-owned land, and the Court held that that alone precluded state regulation of the sale, even in the absence of conflicting federal regulation. 318 U.S. at 294. The Court distinguished *Pacific Coast Dairy* from *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U.S. 261 (1943), decided the same day, in which the same state milk control law was held applicable to War Department contracts that were made on land owned by Pennsylvania, and therefore within Pennsylvania's jurisdiction and control. *Id.* at 295. The Court held that the distinction between regulation on federal land and on state land was not a technical one, but was necessary to preserve the balance between national and state power and honor Congress' exclusive jurisdiction under the Constitutional. *Id.* at 295-96.

It is undisputed that 88% of the Air Force base, including all of the main operational facilities, was ceded to the United States, part in 1945, part in 1950, and the remainder in 1953. PUC Decision at 4 (referring to

Black Hills Exhibit 15F). South Dakota reserved only the right to serve criminal and civil process; it surrendered all other jurisdiction. When there is a transfer of sovereignty, state law adopted after the transfer is without force in the enclave. *Pacific Coast Dairy*, 318 U.S. at 294.

In seeking bids for power in excess of its WAPA allocation, the United States specified that the point of delivery and metering is to be the federally-owned substation located on the base in territory owned by the United States. The electric power delivered to this substation is commingled with the power provided by WAPA and served throughout the entire base. South Dakota's division of the State into franchised utility areas and its authorization to the Commission to regulate electric service based on those assigned service areas was made long after it lost jurisdiction over the territory.[3] Thus, South Dakota had no authority to include the federal enclave in its assigned service territories for the purpose of exerting control over sales of electric service that are consummated within federal territory.

The Commission justifies regulating the United States' ability to use competitive bidding to obtain electrical service by stating the following:

> While the Commission herein does not attempt to exercise any jurisdiction over the United States through its operations through Ellsworth at the Base, the Commission does exert its jurisdiction over Black Hills, Heart'land and West River in determining who has the right to furnish electric service to the Base. Even if that part of the Base which was ceded to the United States is not within the jurisdiction of the Commission, that part of the

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[3]The Commission was first granted the authority to establish assigned service areas in 1965. 1965 S. D. Laws 254, §14 (current version at S.D. Codified Laws Ann. §49-34A-44). The Commission did not establish the territorial boundaries that encompass Ellsworth Air Force Base until 1976. PUC Decision and Order, F-3103 (July 1,1976).

> Base which was not ceded to the United States is under the Commission's jurisdiction, and in order to control the delivery of electric power and energy which is commingled and served throughout the entire Base, it is necessary for the Commission to control the whole.

PUC Decision at 8.

We reject this analysis. First, as the district court noted, the Commission cannot avoid a clear constitutional barrier to state regulation of the enclave by claiming that it is only exercising jurisdiction over the supplier. The same argument failed in *Pacific Coast Dairy, supra*, where the Court rejected the lower Court's determination that the state statute regulates only the purchasing, handling, and processing of milk within California and not the actual sale on Moffett Field. 318 U.S. at 295 . It was clear to the Supreme Court, as it is to us in this case, that the state was simply attempting to regulate sales on federal territory indirectly where it had no authority to do so directly. *Cf. United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963) (Georgia Public Service Commission could not revoke certificates of carriers for contracting at rates other than those prescribed by Commission where state law conflicted with federal procurement policy); *Paul v. United States, supra* (California could not sue milk suppliers whose bids on a contract with United States or at a price below the state minimum when state regulation conflicted with federal procurement policy); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (State could not apply its license requirement to building contractor who contracted with the United States where requirement would frustrate federal policy).[4]

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[4] While these cases discuss conflicting state and federal regulation in the context of the supremacy clause, their analysis is equally applicable to state regulation that interferes with exclusive federal jurisdiction under the enclave clause. They illustrate that a state cannot diminish the constitutional authority of the United States government by regulating the parties with whom it may contract.

This court also finds unpersuasive the assertion that the Commission may exercise jurisdiction over all of the federal territory because approximately 12% of the Air Force base is on land that has not been ceded to the United States. As previously stated, the point of delivery and metering for the overrun electricity is a substation owned by the United States, through WAPA, and is located on land that has been ceded to the United States. The overrun power is commingled with that supplied by WAPA and may or may not be distributed to the buildings in non-federally owned territory. Some of this overrun electrical power, either that provided by WAPA or that provided by the electric utility with whom the United States contracts, may be used in areas that are within the ceded territory. Likewise, some of the power supplied by WAPA, a federal agency over which the Commission admittedly has no jurisdiction, *see* PUC Decision at 8-9, may serve the area that is within the State's jurisdiction. Once the power is commingled at the point of delivery, it is impossible to determine what portion of the base is served by WAPA and what portion is served by the private utility. We believe that exclusive federal jurisdiction over eighty-eight percent of the base need not be surrendered because of the possibility that the purchase and distribution of electricity within the enclave may affect the need for electricity on the small section of the base that is still within South Dakota's jurisdiction. These effects are not enough to allow the Commission to regulate transactions that take place exclusively within the enclave. *Cf. United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973)) (twenty-first amendment confers no power on a state to regulate importation of alcohol into a military base on exclusive federal territory even if liquor sold there is for use and consumption on state-owned land).

The facts indicate that the purpose behind the State's regulation of service territories, the "prevention of unnecessary duplication of electric facilities," PUC Decision

at 8, would be best served if the United States had jurisdiction over the procurement and distribution of electric service for the entire base. As previously stated, with the exception of the Renel Heights housing area, the United States owns, operates and maintains the entire Ellsworth electrical system. In addition, the Commission admits that it has no jurisdiction to restrict the amount of electrical service generated by the United States through WAPA, and that WAPA *could* serve even the non-ceded portions of the base. *Id.* at 8-9. In fact, until 1984, when the demand for power at Ellsworth exceeded its WAPA allocation, the Commission did not control the power that was delivered to the non-ceded portion of the base. Thus, the rationale that the Commission's lack of authority to control the flow of power to the state-owned territory will result in unnecessary duplication of electric facilities is without logic. However, we need not extend the jurisdiction of the United States beyond the borders of the federally-owned territory in order to hold that South Dakota has no jurisdiction to prevent the United States from using competitive bidding to purchase electric service for delivery within the enclave.

Black Hills and the Commission assert that state jurisdiction is permissible because there is no interference with the jurisdiction asserted by the federal government. However, the cases cited by appellants do not support their position regarding state jurisdiction or regulation within a federal enclave. Appellants argue that *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624 (1953), provides authority for the Commission's division of Ellsworth into assigned service areas. In *Howard*, the Supreme Court allowed the City of Louisville to annex certain territory, embracing a Naval Ordnance plant that had been acquired by the United States. The Court held that it was permissible for the State to include the plant within the boundaries of the city, as "[a] state may conform its municipal structures to its own plan, *so long as the state does not interfere with the exercise of juris-*

diction within the federal area by the United States." Id. at 626-27 (emphasis added). Thus, *Howard* does nothing to alter the exercise of exclusive federal jurisdiction over federally-owned territory. The Court determined in that case that including the enclave within the city's boundaries did nothing to affect the use or disposition of the property by the United States. *Id.* at 627. However, by ordering the United States to contract with a particular utility based on an assigned service area, the South Dakota Public Utilities Commission has directly interfered with the United States'control over the provision of electrical service within the base. Similarly, the other cases cited by Appellants all involve instances in which the state regulation only generally affected federal property, and in no way placed any restrictions on the ability of the United States to enter into contracts regarding the use of the federally-owned property. *See, United States v. City of Bellevue,* 474 F.2d 473 (8th Cir.), *cert. denied,* 414 U.S. 827 (1973) (City may annex Air Force base to the extent permitted by Congress); *Bartsch v. Washington Metropolitan Area Transit Commission,* 357 F.2d 923 (4th Cir. 1966) (per curiam) (Washington, D.C. Commission had jurisdiction to set taxicab rates to and from Washington National Airport, a federal enclave).

In two factually similar cases, it was recognized that state regulation of utility service to federal installations intrudes upon the exercise of exclusive federal jurisdiction. In *Re Souris River Telephone Mutual Aid Corporation,* 24 Pub. Util. Rep. 3d (PUR) 84 (1958), the North Dakota Public Sevice Commission held that it had no power to grant or deny a certificate to construct telephone facilities on a federally owned Air Force base where jurisdiction and control of the land had been transferred to the federal government. *Id.* at 86. Likewise, in *Arkansas Power and Light Company v. Arkansas Public Service Commission,* 231 Ark. 142, 330 S.W.2d 51, *cert. denied,* 362 U.S. 975 (1960), the Arkansas

Supreme Court recognized that allowing the State Public Service Commission to designate, based on specified service areas, the utility from which the United States government must purchase electricity would interfere with carrying out the operations of the Air Force base. *Id.* at 144-148, 330 S.W.2d at 52-54. In that case, because the United States had not acquired jurisdiction over the land on which the Air Force base was located, the Arkansas court based its decision on actual conflict between state and federal regulation. Here we are dealing with a federal enclave, and the United States has exclusive jurisdiction even absent such conflict. *Paul*, 371 U.S. at 263-64.

II.

Black Hills and the Commission argue strenuously that even if this is federally-owned territory, Congress has taken specific action mandating that federal procurement officers follow state utility franchise law in purchasing electricity. *See Paul*, 371 U.S. at 245. In substance, appellants argue that even if the federal government has exclusive jurisdiction over the enclave, federal law specifically defers to state utilities franchise law and prevents Ellsworth from procuring services through competitive bidding. After carefully examining the relevant federal law, we must reject this argument.

Federal procurement law is specifically designed to ensure "active competition so that the United States may receive the most advantageous contract." *Paul*, 371 U.S. at 253. The authority to procure public utility services for the military has been delegated by the General Services Administration (GSA) to the Secretary of Defense. *See* 15 Fed. Reg. 8227 (Dec. 1, 1950) (adopted as amended at 41 C.F.R. §101-33.002). The "Statement of Understanding " between the GSA and the Department of Defense provides that:

> The basic purpose of the agreements and procedures outlined herein relating to utility services

> is that all these services shall be procured or provided *at the minimum practical total cost to the government.*

Id. (emphasis added).

The statutes and regulations applicable when the United States solicited bids in 1984–as well as the recent amendments under the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (relevant portions codified in scattered sections of 10 U.S.C. and 41 U.S.C.), applicable at the time of the two subsequent procurement decisions[5] – do not mandate that federal officers follow state utility franchise law in procuring electrical service. Quite the opposite is true. The Federal Acquisition Regulation makes clear that the general rule is the promotion of "full and open competition in soliciting offers and awarding Government contracts." 48 C.F.R. §6.101 (1985) (citing 10 U.S.C. §2304 (Supp. III 1985)). The procuring agency must use competitive procedures unless the agency, in exercising its discretion, determines that competition does not exist. If the procurement official determines that competition does not exist, the regulations *permit* him to depart from standard competitive procedures. However, there is nothing in the regulations that *require* him to do so.

One example of when an agency may depart from using competitive procedures is when there is only one available source:

> The head of an agency may use procedures other than

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[5] An appellate court must apply the law in effect at the time it renders its decision. *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) (quoting *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969)). Thus, we must consider the Competition in Contracting Act as applicable law. This is particularly appropriate since this case is one for injunctive relief–an order requiring the government to purchase electrical service for Ellsworth from Black Hills.

competition only when -

> (1) the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency.

10 U.S.C. §2304(c)(1); *see also* 48 C.F.R. 6.302-1(a)(2).

The term "responsible source" is defined at 41 U.S.C. §403 (Supp. III 1985).[6] It includes a number of relevant factors to be considered by the procuring agency, one of which is whether the prospective contractor "is otherwise qualified and eligible to receive an award under applicable laws and regulation." *See id.* §403(8)(G). Black Hills argues that "[s]tate electric law is applicable law" and that these regulations "strengthen the argument that the Department of Defense should follow state law in the procurement of utility services." Black Hills Brief at 39, 41. The statute's reference to "applicable law," however, does not change the discretionary nature of determining whether more than one responsible source exists and whether competitive procedures should be departed from.

It is relevant that in the *Paul* case, *supra*, the Supreme Court examined almost identical language in a federal

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[6] This section provides: the term "responsible source" means a prospective contractor who – (A) has adequate financial resources to perform the contract or the ability to obtain such resources; (B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments; (C) has a satisfactory performance record; (D) has a satisfactory record of integrity and business ethics; (E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills; (F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and (G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

procurement provision and held that it did not require the procurement official to follow state law:

> [T]he references to rates or prices "fixed by law or regulation" are merely minor collateral accommodations to those situations where, within the limits of the Regulation and the 1962 Act, the federal procurement official decides that the practical way to obtain the supplies or services is by following the state price-fixing or rate-fixing system.

371 U.S. at 260-61.

Thus, the determination of whether competition exists is not one to be made based on South Dakota utility franchise law, but instead is within the sound discretion of the Air Force.

Uniform policy for the procurement of utility services by the Department of Defense is provided by Armed Services Procurement Regulation Supplement No. 5. *See* 48 C.F.R. §208.3 (1985). Contrary to the assertions of the Commission and Black Hills, Supplement No. 5 does not amount to specific congressional action directing the Air Force to follow state utility service areas in purchasing electricity. While Supplement No. 5 describes instances in which competition may not be possible because of the existence of state franchise areas, it includes no directive to Department of Defense agencies to surrender their discretion in determining the the existence of competition in order to secure a contract for the government "at the minimum practical total cost * * *." 15 Fed. Reg. 8227 (Dec. 1, 1950).

Appellants rely quite heavily on the language in paragraph S5-104.1, entitled "Determination as to the Existence of Competition," which states:

> (a) Although in most instances utility service suppliers operate in franchised territory, competition may nevertheless exist–for example, where more than one supplier is franchised for a given loca-

> tion, or where more than one supplier is able to provide service at a given location but no supplier has yet been franchised for that location. Therefore, when the location of a new military installation has been determined and the procurement of utility services is authorized, the contracting activity shall determine whether more than one supplier can provide the service. Where competition exists, proposals shall be solicited from all potential suppliers. Even where one of the competing potential suppliers has entered into a GSA area contract, proposals shall be solicited to determine definitely which of the suppliers offers more advantageous competing services under the particular circumstances.
>
> (b) Similarly, where an existing installation is being served by one supplier, and either another prospective supplier requests an opportunity to furnish the service or the Department concerned becomes aware of another potential supplier, the Department shall determine whether more than one supplier can provide the service. Where competition is found to exist, competitive solicitation of proposals shall be initiated at whatever time is considered to be most advantageous to the Government.

The district court correctly determined that this section applies only to new military installations or existing installations being served by only one supplier. Slip op. at 11. Ellsworth is neither a new installation nor is it supplied electricity only by Black Hills. To the contrary, the majority of its power is provided by WAPA through the WAPA owned system. Even in those instances where paragraph S5-104.1 does apply, the main concern is whether competition exists as a practical matter. While state franchise territories may indicate that competition is not possible, their existence does not preclude the United States from making this determination. In the present case, the United States owns the electrical system that serves over 94% of the Air Force base. The Ellsworth

contracting officer determined that a number of potential suppliers could distribute energy through the federally-owned lines without duplication of transmission facilities. Having determined that competition exists, Supplement No. 5 mandates that "proposals shall be solicited from all potential suppliers." ¶S5-104.1(a). Thus, the actions of the Air Force in seeking competitive bidding for the overrun electricity were clearly authorized by the relevant procurement statutes and regulations.[7]

III.

Finally, we must address the controversy surrounding Section 8.304-91 of the Air Force Federal Acquisition Regulation Supplement issued on June 24, 1985, the proposed rule of May 7, 1986, and subsequent congressional legislation preventing enforcement or implementation of either of these new regulations.[8]

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[7] Appellants' reliance on the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§2601-2645 (1982), is misplaced. That Act simply indicates that the federal government has not preempted state regulation of electric utilities that provide retail service. Although the Act recognizes that states may continue to regulate the operations of utility suppliers within the state, it does not permit state regulations to displace federal jurisdiction on a federally-owed enclave. Nor does it alter federal procurement law. *See, e.g., United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963), (although state generally regulates shipping rates by intrastate carriers, regulations must give way in light of conflicting federal procurement policy).

[8] The addition to the Air Force Federal Acquisition Regulation Supplement, section 8.304-91, provides:

> The contracting officer shall determine by market survey if more than one supplier can furnish needed public utility services for proposed procurements prior to using other than competitive procedures. The existence of

(Footnote continued on the following page)

The Air Force regulation was issued by the Department of the Air Force as an internal procurement management instruction and was not published in the Federal Register.[9] The May 7, 1986 proposed rule was proposed jointly by the Department of Defense, GSA, and NASA. Both the proposed rule and the Air Force regulation make clear that contracting officers must acquire utility services competitively, and the existence of state or local franchise service territories may not be used as a basis for deeming the acquisition of utilities to be a "sole source" exception to the normal competition requirements. This is a departure from previous regulations in that it takes away the discretion of the federal agencies: they must, in

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8 *(Continued)*

> franchised service territories established by state or local governmental entities does not in and of itself restrict acquisition of public utility services to a sole source. The contracting officer need not enter into a contract with the state or locally franchised public utility supplier simply because the supplier has obtained the local franchise. The contracting officer should instead seek to competitively acquire public utility services whenever possible.

Likewise, the relevant part of the May 7, 1986 proposed rule states: 41.104 Acquisition Policy * * * (b) The existence of franchised service territories is not a justification for the acquisition of utility services on a "Sole Source"basis (see 6.302-1). * * * (d) The contracting officer shall acquire utility services by contract * * * whether or not rates or conditions of service are fixed by a Federal, State, or other regulatory body. 51 Fed. Reg. 16989 (1986) (to be codified at 48 C.F.R. pt. 41) (proposed May 7, 1986).

[9] In their briefs, appellants argue that this regulation was not timely issued under section 2752 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1203 (referenced in 41 U.S.C. §403 note), and that it was a substantive change that should have been published in the Federal Register. In light of the subsequent congressional legislation prohibiting the regulation's enforcement or implementation, we need not address this question.

every case, use competitive procedures.

The district court referred to the proposed rule in its opinion and intimated that although it did not apply retroactively to the 1984 procurement, it appeared to moot Black Hills' claim for any future injuctive relief. Slip op. at 12. Since the district court opinion was issued, however, Congress has adopted legislation that prevents any of the funds appropriated for the Department of Defense in 1987 to be used to implement or enforce either the proposed rule or Section 8.304-91 of the Air Force FAR Supplement. Act of Oct. 18, 1986, Pub. L. No. 99-500 (enacting into law H.R.J. Res. 738, 99th Cong., 2d Sess. (1986) (making continuing appropriations for the fiscal year 1987)). Furthermore, the Conference Committee has directed the Department of Defense "not to implement additional changes affecting the purchase of utilities until after they have been formally presented to and approved by the Committee on Appropriations of the House and Senate." 132 Cong. Rec. H10728 (daily ed. Oct. 15, 1986). Responding to the "sigificant policy issues" raised by the proposed rule, the Department of Defense, GSA, and NASA stated that a final rule on the acquisition of utility services would not be promulgated until those issues are resolved. 51 Fed. Reg. 36970 (Oct. 16, 1986). They issued a final rule amending FAR Section 8.300 to read:

> This subpart prescribes policies and procedures for the acquisition of utility services. Agency policies and procedures predating the effective date of the Federal Acquisition Regulation (FAR) may continue to be used. However, any new or changed policies or procedures must be approved in advance by the appropriate FAR council.

Id. at 36971.

Appellants contend that this new congressional legislation and the amendment to FAR reaffirm Supplement No. 5 as the applicable law in procuring utility services. While this is a correct assertion, it does not advance their

position. We have already determined that Supplement No. 5 does not require the federal government to defer to a state's regulation of franchise territories; nothing in the new legislation changes this. The reports accompanying the legislation indicate concern over a general procurement policy that would require federal contracting officers to "ignore state-created utility service territories." S. Rep. No. 406, 99th Cong., 2d Sess., §618, at 68 (1986); H.R. Rep. No. 723, 99th Cong., 2d Sess., 620, at 79 (1986). The Senate report states the following:

> The Committee has adopted this section to protect utility customers from the burden of increased rates that inevitably would result if federal facilities abandon local utility systems. Utility systems have built necessary capacity under State-created obligations to serve all customers, including federal facilities, within their service territories. As a general rule, under state law only one utility is authorized to provide retail utility service within its service territory. The proposal has serious legal, technical, and economic repercussions. The committee intends that this provision avoid these detrimental consequences.

S. Rep. No. 406, 99th Cong., 2d Sess. §618, at 68 (1986).

This statement indicates that Congress was concerned with a particular situation: one in which a federal facility that obtains all of its electricity from a single utility switches suppliers and abandons a local utility system that has already built the necessary capacity. In the present case, however, the general rule that "only one utility is authorized to provide retail utility service" does not apply. Both WAPA and Black Hills provide service to the main base.[10]

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[10] The parties have strongly disputed whether the sale of overrun power to Ellsworth is a sale at retail or wholesale. The

(Footnote continued on the following page)

Ellsworth is not abandoning the Black Hills facilities, but is making the most efficient use of the existing WAPA distribution system.[11] We do not believe that Congress intended to prevent the use of competitive procedures in this situation. Had Congress wanted to mandate that state franchise law governs the determination of when a utility is in a "sole source" position, it could easily have done so. Congress has specifically provided that agencies may use other than competitive procedures if a statute requires that procurement be from a specified source. 10 U.S.C. §2304 (c)(5). However, Congress has never enacted a statute requiring that the United States purchase utility service from local franchise utilities. Finding nothing in federal law that specifically directs such procurement, we cannot order Ellsworth to contract with Black Hills for the overrun electrical service to an exclusive federal enclave.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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10 *(Continued)*

Commission determined that, under South Dakota law, the sale is at retail. The district court, however, did not reach that issue. For our present purpose, it is relevant to note only that, whatever label is given to the type of electric service being provided, the electricity delivered by WAPA and by the supplier of the overrun amounts is used for the same purposes. Thus, there is more than one authorized utility providing the same service.

[11] The competitive bidding procedure for procuring overrun power had no effect on Black Hills' service to the Renel Heights area. Black Hills continues to use its electrical system to provide service to this housing area.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
October 16, 1985
WILLIAM F. CLAYTON
CLERK
arr

BLACK HILLS POWER & LIGHT COMPANY, a South Dakota Corporation, *Plaintiff,* *v.* **CASPAR W. WEINBERGER, et al,** *Defendant.*	CIV 85-5031
BLACK HILLS POWER & LIGHT COMPANY, a South Dakota Corporation, *Plaintiff,* *v.* **HEARTLAND CONSUMERS POWER DISTRICT, ELLSWORTH AIR FORCE BASE: UNITED STATES OF AMERICA,** *Defendants.*	CIV 85-3015 ORDER
BLACK HILLS POWER & LIGHT COMPANY, a South Dakota Corporation, *Plaintiff,* *v.* **HEARTLAND CONSUMERS POWER DISTRICT, ELLSWORTH AIR FORCE BASE: UNITED STATES OF AMERICA,** *Defendants.*	CIV 85-4068
UNITED STATES OF AMERICA, *Plaintiff,* *v.* **THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA,** *Defendant.*	CIV 85-5064

In accordance with this Court's Memorandum Opinion, it is hereby

ORDERED that in CIV 85-5031 Plaintiff Black Hills Power & Light Company's Motions for a Preliminary Injunction and for Summary Judgment are denied. Furthermore, it is hereby

ORDERED that in CIV 85-5031 Defendants' Motion to Dismiss is granted. It is also

ORDERED that CIV 85-3015 is hereby dismissed as moot. Similarly, it is hereby

ORDERED that CIV 85-4068 is hereby dismissed as moot. Finally, it is hereby

ORDERED intervenor Black Hills Power & Light's Motion to Dismiss CIV 85-5064 be, and the same hereby is, granted.

Dated this 16th day of October, 1985.

BY THE COURT:

ANDREW W. BOGUE

ANDREW W. BOGUE,
SENIOR JUDGE

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY /s/ ALICE R. RAESLY DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
October 16, 1985
WILLIAM F. CLAYTON
CLERK

BLACK HILLS POWER & LIGHT COMPANY, a South Dakota Corporation, *Plaintiff,* v. **CASPAR W. WEINBERGER, et al,** *Defendant.*	CIV 85-5031
BLACK HILLS POWER & LIGHT COMPANY, a South Dakota Corporation, *Plaintiff,* v. **HEARTLAND CONSUMERS POWER DISTRICT, ELLSWORTH AIR FORCE BASE: UNITED STATES OF AMERICA,** *Defendants.*	CIV 85-3015
	MEMORANDUM OPINION
BLACK HILLS POWER & LIGHT COMPANY, a South Dakota Corporation, *Plaintiff,* v. **HEARTLAND CONSUMERS POWER DISTRICT, ELLSWORTH AIR FORCE BASE, and UNITED STATES OF AMERICA,** *Defendants.*	CIV 85-4068
UNITED STATES OF AMERICA, *Plaintiff,* v. **THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA,** *Defendant.*	CIV 85-5064

There are four consolidated cases before this Court on various motions. The cases which have been consolidated and the motions which have been made are as follows:

I.

BLACK HILLS POWER & LIGHT CO. vs. CASPAR W. WEINBERGER, *ET AL*–CIV 85-5031

This action for declaratory and injunctive relief was commenced by Planitiff Black Hills Power & Light Company, a South Dakota Corporation (hereinafter BHP&L) against Caspar W. Weinberger, as Secretary of the Department of Defense, an agency of the United States of America, Richard D. Rasmussen, as contracting officer for Ellsworth Air Force Base (EAFB), a defense installation under the control of the Department of Defense, Heartland Consumers Power District, a subdivision of the State of South Dakota (hereinafter Heartland), West River Electric Association, Inc., a South Dakota rural electric cooperative, and the South Dakota Public Utilities Commission (hereinafter PUC), a regulatory commission of the State of South Dakota. Essentially, BHP&L seeks to have this Court require the United States to contract with BHP&L for the provision of overrun power to EAFB. Additionally, BHP&L seeks to have this Court declare the contract into which the United States and Heartland entered void. The other specific relief sought by BHP&L is set forth at pages 10 and 11 of its Complaint.

In this action BHP&L initially moved for a preliminary injuction. Subsequently, the United States moved to dismiss this action pursuant to Federal Rule of Civil Procedure 12. The rationale for the motion to dismiss is set forth by the United States as follows:

> . . . [T]he grounds for this motion are that this Court has no jurisdiction to order the the United States to enter into a contract with Black Hills; that plaintiff's action is barred by the Supremacy Clause of the United States Constitution because

> the South Dakota Public Utilities Commission cannot regulate the manner in which the United States Government seeks to secure services for its military installations, that the state may not regulate a federal enclave; and that there is no entitlement to a contract with United States . . .

After the Government filed its Motion to Dismiss, BHP&L moved for summary judgment in this action. In this motion, BHP&L recites that " . . . the entire record before the Public Utilities Commission of the State of South Dakota wherein Plaintiff was granted the right to serve electric service to Ellsworth Air Force Base and all of the other files and briefs and pleadings are hereby incorporated by reference into this motion . . . " These three motions are before the Court for resolution.

II.

IN THE MATTER OF THE COMPLAINT OF THE BLACK HILLS POWER & LIGHT COMPANY AGAINST HEARTLAND CONSUMERS POWER DISTRICT WITH REGARD TO ELECTRIC SERVICE TO ELLSWORTH AIR FORCE BASE NOTICE OF APPEAL - CIV 85-3015

The PUC entered a Decision and Order on February 4, 1985 in which it held that EAFB was required to be served by BHP&L. The United States, on behalf of EAFB, appealed that decision in the South Dakota Circuit Court, Sixth Judicial Circuit, County of Hughes. The West River Electric Association, Inc. also appealed the PUC decision in the Circuit Court, Sixth Judicial Circuit, County of Hughes. The United States subsequently removed this appeal to the United States District Court for the District of South Dakota, Central Division. This appeal was subsequently consolidated with CIV 85-5301, 85-4068 and CIV 85-5064 in this division.

There are no motions outstanding in this appeal.

III.

IN THE MATTER OF THE COMPLAINT OF BLACK HILLS POWER AND LIGHT COMPANY AGAINST HEARTLAND CONSUMERS POWER DISTRICT WITH REGARD TO ELECTRIC SERVICE TO ELLSWORTH AIR FORCE BASE-CIV 85-4068

Heartland Consumers Power District appealed from the February 4, 1985 PUC decision in the South Dakota Circuit Court, Fourth Judicial Circuit, County of Lake. The United States subsequently removed this appeal to the United States District Court for the District of South Dakota, Southern Division. This appeal was subsequently consolidated with CIV 85-5031, CIV 85-3015 and CIV 85-5064 in this division.

There are no motions outstanding in this appeal.

IV.

UNITED STATES OF AMERICA VS. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA - CIV 85-5064

The United States brought this action against the PUC seeking declaratory and injunctive relief. Essentially, the United States seeks to have this Court enjoin the PUC "from preventing the United States from seeking the most advantageous contract for the supply of electricity to Ellsworth Air Force Base." This action was subsequently consolidated with CIV 85-5031 and CIV 85-3015 and CIV 85-4068. BHP&L moved to intervene in CIV 85-5064 and also moved to dismiss CIV 85-5064.

BRIEF FACTUAL BACKGROUND

The record from the hearing before the PUC is voluminous. The recitation of facts necessary for decisions on the motions currently before the Court is, however, relatively brief.

EAFB is a military installation of the Department of

Defense which is located in parts of Meade and Pennington Counties, South Dakota. Prior to 1984, the main base electic power needs of EAFB were provided by the Western Area Power Administration (hereinafter WAPA), an agency of the United States Department of Energy. BHP&L supplied and continues to supply electricity for the Renel Heights housing area located on the base. In 1984 WAPA concluded that it was unable to provide all of EAFB's main base electrical needs. The United States then sought to meet EAFB's overrun needs for electricity through the solicitation of proposals for the supplying of these needs.

The United States received a total of five bids for the supplying of EAFB's additional electric needs. Amongst the proposals was one from BHP&L. The contract was awarded to the lowest bidder, Heartland. In October of 1984, Heartland and the United Stated then entered into a one-year contract for the delivery of the overrun electricity.

BHP&L subsequently filed a protest with the EAFB contracting officer in accordance with the Federal Acquisition Regulations (FAR). Before a response to that protest had been given, BHP&L filed a complaint with the PUC. The PUC determined that another entity, the West River Electric Association, was a party to the proceedings on the complaint, together with Heartland, EAFB and BHP&L. Hearings were held before the PUC in December, 1984 and January, 1985.

On February 4, 1985, the PUC issued its decision. The PUC ruled that BHP&L "is the electric utility which is entitled to furnish, and from which Ellsworth shall acquire, all of the electric power and energy needs of the United States at that part of Ellsworth Air Force Base referred to in these findings as the "Base" . . ." The Decision of the PUC then specified that nothing therein should be interpreted to preclude EAFB from obtaining power through WAPA.

The cases and appeals which are here consolidated sprang up after this PUC Decision and Order were entered.

DECISION

The threshold question[1] with which this Court must deal is the Supremacy Clause issue. Article VI, Clause 2 of the United States Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The Supreme Court has had numerous opportunities to construe the Supremacy Clause. See, *e.g. Paul v. United States*, 371 U.S. 245, 253 (1963); *Public Utilities Commission v. United States*, 355 U.S. 534 (1958); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963) and *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956). This court has also had occasion to rule on the Supremacy Clause. See *e.g. Citizens & Landowners, etc. v. Secretary, etc.*, 513 F.Supp. 257 (D.S.D. 1981), affirmed, 683 F.2d 1171 (8th Cir. 1982).

The test to be applied in Supremacy Clause cases was reiterated by the Court of Appeals for the Eighth Circuit in *Citizens, supra.* at 1178. Specifically, the Court stated:

> . . . In *Hancock v. Train*, 426 U.S. 167, 178, 96 S.Ct. 2006, 2012, 48 L.Ed.2d 555 (1976), the Supreme Court stated:
>
> It is a seminal principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and

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[1] Numerous and voluminous briefs have been filed in this case. The Court will not address every issue which has been raised but, instead, will discuss those issues upon which its decision is based and which it believes are dispositive.

> cannot be controlled by them." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426, 4 L.Ed. 579 (1819).
>
> Accordingly, "the activities of the Federal Government are free from regulation by any state." *Id.* at 178, 96 S.Ct. at 2012, *quoting Mayo v. United States*, 319 U.S. 441, 445, 63 S.Ct. 1137, 1139, 87 L.Ed. 1504 (1943) (footnote omitted).
>
> Congress, of course, may choose to subject its instrumentalities or property to state regulation. However,
>
> > [b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is a "clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous." *Hancock v. Train*, supra, 426 U.S. at 179, 96 S.Ct. at 2012 (footnotes omitted).

The parties disagree strenuously concerning the existence or non-existence of: (1) a conflict between the federal law involved and the relevant state law and (2) the presence or absence of a "clear congressional mandate" concerning the allowance of state regulation of the Federal Government's acquisition of electric power on a federal military installation.

In order to discern if a conflict exists and whether Congress has spoken "clearly and unambiguously", the relevant federal law must be examined. The law which applies to the procurement of this electric service is set forth at 10 U.S.C. § 2301 *et. seq.*, as amended by the Competition in Contracting Act of 1984, §§ 2721-27, 98 Stat. 1175, 1185-95.[2]

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[2]The amendments apply to solicitations for proposals after March 31, 1985 and are therefore not at issue here.

The Government contends that it negotiated the contract under what was 10 U.S.C. §2304(g) which provides that:

> In all negotiated procurements in excess of $25,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured. . . ..

The Federal Acquistion Regulation which pertains to the transaction in question is found at 48 CFR § 203.3, Acquisition of Utility Services. That regulation states: "See Supplement No. 5, Procurement of Utility Services." The meaning of certain provisions of Supplement No. 5 constitutes the crux of the disagreement between the United States, the WREA and Heartland on one side and BHP&L and the PUC on the other side.

The PUC specifically found that EAFB "failed to follow the provisions of Supplement No. 5, including S5-102, S5-103.2(a), S5-104.1(a)(b)." (PUC Decision and Order, page 5, Finding of Fact 11). It is around these provisions that the controversy continues to exist. Therefore, the relevant positions of the Supplement will be set forth in their entirety.

> SF-102 *General* provides as follows:
> SF-102 General. Utility suppliers may be quasi-public service corporations, private concerns, municipalities, associations, or cooperatives. They generally operate in a franchised territory without competition, so they may frequently be in a "sole source" position. Under common law, however, public utilitites must render service at reasonable rates and without unjust discrimination. Furthermore, their operations, management, rates, and profits are usually regulated by Federal, state, or local regulatory bodies, but absence of a regulatory body does

not necessarily mean a complete lack of control. Administrative remedies pursuant to enabling statutes may be pursued or complaints may be taken to a court of competent jurisdiction. In instances where such remedies are to be taken, authorization shall be obtained from the Chief of Engineers for the Army; the Commander, Naval Facilities Enginering Command for the Navy; or Headquarters USAF (AF/LGPLA) for the Air Force; the Executive Director of Procurement and Production, for DSA; or their designees.

This provision is descriptive in nature and does not mandate any particular action on the part of the United States. Furthermore, a subsequent regulation, S5-103.2, specifically enumerates the matters concerning which the Department of Defense defers to state regulations.

S5-103.2 *Procurement from Utility Suppliers.*

(a) The Department of Defense procures utility services from industries which are, to a greater or lesser extent, regulated by Federal, state, and local regulatory bodies. Notwithstanding the other provisions of this Regulation, as to those matters over which the appropriate regulatory body has taken jurisdiction *it is the policy of the Department of Defense, as a matter of comity rather than law, to comply with the current regulations, practices, and decisions of that body concerning accounting practices, allowability of costs pricing, and rates, subject to judicial appeal through the normal channels.* As to those matters concerning which the regulatory body has not accepted jurisdiction or has not spoken, or for which there is no appropriate regulatory body, the rules of the Federal Power Commission and the general practices of the particular utilities industry as to accounting practices, allowability of costs, pricing, and rates shall be followed. This policy does not extend to the regulations, practices, or decisions of regulatory bodies whose decisions are not subject to judicial appeal, nor does it extend to those agencies which are regulating utilites owned or operated by the same Governmental entity which

> has established the regulatory body. (Emphasis added.)

This Court simply cannot agree with the PUC's finding that the United States failed to follow the requirements of S5-103.2. This subsection states that the United States is deferring to "the appropriate regulatory body" concerning "accounting practices, allowability of costs pricing and rates." The subsection goes no further.

The next subsection which the PUC found had been violated by the United States is S5-103.3, *Cost or Pricing Data.* That section provides as follows:

> S5-103.3 *Cost or Pricing Data.*
>
> Rates or preliminary estimates quoted by utility suppliers for services for which the rates are established by an effective, independent regulatory body are considered "prices set by law or regulation" even if the rate will not be formally established until after the execution of the contract. Accordingly, such utility suppliers are not required under 3-807.3 to submit cost or pricing data for such services prior to the awarding of the contract. On the other hand, rates or preliminary estimates quoted by a utility supplier for service for which the rates are not established by an effective, independent regulatory body are not considered "prices set by law or regulation" even though the supplier itself may be subject to regulation. The provisions of 3-807.3 which relate to the "prices set by law or regulation" exception from the requirement for the submission of cost or pricing data shall be applied in accordance with the above guidance; the provisions of 3-807.3 relating to the other exceptions are not affected by this paragraph.

This regulation does not address the issue of determining whether there is more than one prospective supplier.

The last regulatory provision which the PUC found that the United States has violated and about which controversy has existed in this case is S5-104 *Competitive*

Procurement of Utility Services.

S5-104 *Competitive Procurement of Utility Services.*

S5-104.1 *Determination as to Existence of Competition.*

(a) Although in most instances utility service suppliers operate in franchised territory, competition may nevertheless exist – for example, where more than one supplier is franchised for a given location, or where more than one supplier is able to provide service at a given location but no supplier has yet been franchised for that location. *Therefore, when the location of a new military installation has been determined and the procurement of utility services is authorized, the contracting activity shall determine whether more than one supplier can provide the service.* Where competition exists, proposals shall be solicited from all potential suppliers. Even where one of the competing potential suppliers has entered into a GSA area contract, proposals shall be solicited to determine definitely which of the suppliers offers more advantageous competing services under the particular circumstances. (b) Similarly, *where an exisiting installation is being served by one supplier, and either another prospective supplier requests an opportunity to furnish the service or the Department concerned becomes aware of another potential supplier, the D partment shall determine whether more than one supplier can provide the service.* Where competition is found to exist, competitive solicitation of proposals shall be initiated at whatever time is considered to be most advantageous to the Government. (Emphasis added.)

On its face, this regulation only applies to (a) new military installation or (b) existing military installations that are only served by one supplier. Therefore, the regulation simply does not apply to the case at bar.

This Court cannot find in these regulations the "clear congressional mandate" for the state of South Dakota to regulate the United States' acquisition of utility services on military bases. Absent such a clear congressional man-

date, this Court cannot conclude that it was Congress' intention that the United States be forced to contract with the electric utility specified by the PUC. The conflict between the PUC's attempt to designate the supplier from whom the United States must obtain service and the Federal Government's policy of competition is apparent.

After the initial briefing had been concluded in this case, a subsequent round of briefing was prompted by the addition to the Air Force Federal Acquisition Regulation Supplement (AFFARS) which provides as follows:

> 8.304-91 Competition
>
> The contracting officer shall determine by market survey if more than one supplier can furnish needed public utility services for proposed procurements prior to using other than competitive procedures. The existence of franchised service territories established by state or local governmental entities does not in and of itself restrict acquisition of public utility services to a sole source. The contracting officer need not enter into a contract with the state or locally franchised public utility supplier simply because the supplier has obtained the local franchise. The contracting officer should instead seek to competitively acquire public utility services whenever possible.

There has been controversy concerning the federal government's observance of the necessary prerequisites for the passage of this regulation. Even if the federal government has not observed all the necessary prerequisites for the passage of this regulation, which appears unlikely to this Court, the Court concludes that such a regulation could ultimately be enacted. Although this regulation would not apply retroactively to a contract negotiated in the fall of 1984, it would appear to remove any and all possible doubt that the government would be free to negotiate with whom it wants, as it did with Heartland in the instant case, in the future. As the Plaintiff in CIV 85-5031 has not sought any money damages for damages arising from the October 1984

to October 1985 contract the federal government executed with Heartland, the regulation would seem essentially to moot BHP&L's lawsuit.

The PUC and BHP&L have argued that even if this Court should find that the PUC cannot regulate the United States (which the PUC avers that it is not attempting to do), this Court should declare the contract between Heartland and the United States void because it is Heartland which the PUC is regulating, *not* the United States. If this argument were to prevail, it is difficult to imagine a case where the state could not regulate indirectly (by regulating the distributor or supplier) what, under the Supremacy Clause, it is not permitted to regulate directly (that is, the Federal Government). In *Paul v. United States*, *supra*, (which was decided after *Penn Dairies, Inc. v. Milk Control Comm. of Pennsylvania*, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed 748 (1943)) reference is made to the California Director of Agriculture's attempts to stop distributors from selling milk to the federal military installations at prices below the California established minimum prices. The Director of Agriculture did not bring any action against the United States but, instead, sought recourse against the distributors. As the United States Supreme court observed:

> . . . While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law. Moreover, when the supply contract is negotiated because "it is impracticable to obtain competition," to use the statutory words, it is the state agency, not the federal procurement officer and the seller, that determines the price provisions of the contract, if state policy prevails. The collision between the federal policy of negotiated prices and the state policy of regulated prices is as

> clear and acute here as was the conflict between federal negotiated rates and state regulated rates in *Public Utilities Comm. of State of California v. United States*, supra . . . at 253.

For these reasons, the Court declines the invitation to declare the contract between Heartland and the United States void.

Somewhat similarly, it has been argued by the Plaintiff that the allowance of the contract between Heartland and the United States would afford Heartland more power than has been granted to it by the State of South Dakota. It is urged that such a result contravenes the Tenth Amendment to the United States Constitution. This Court agrees with the federal defendants' response to this particular argument.

Additionally, this Court concludes that the PUC lacks jurisdiction over EAFB because it is an exclusive federal enclave. See Article I, section 8, clause 17 of the United States Constitution and SDCL 1-1-1. In construing the relevant portion of the United States Constitution, the United States Supreme Court has observed that "[t]he cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. 1, §8, cl. 17, by its own weight, bars state regulation without specific congressional action." *Paul v. United States*, *supra*, at 263.

Furthermore, even if this Court did not find the *Paul* decision determinative on this issue, the Court would nonetheless refuse to declare the contract void. SDCL 49-34A-42 *Electric Utility's exclusive rights in assigned service area -- Connecting facilities in another area* is the statute under which the PUC concluded that BHP&L has the right to provide service at Ellsworth. That statute provides, in pertinent part, as follows:

> Each electric utility shall have the exclusive right to provide electric service at retail at each and every location where it is serving a *customer* as

of March 21, 1975 .... (Emphasis added.)

A customer is defined at SDCL 49-34A-1(3) as "... any person contracting for or purchasing gas or eletric service from a utility."

The definition of person is:

> "... a natural person, a partnership, a private corporation, a public corporation, a municipality, an association, a cooperative whether incorporated or not, a joint stock association, a business trust, any political subdivision or agency, or two or more persons having joint or common interest." SDCL 49-34A-1(11).

BHP&L has argued strenuously for the proposition that the United States is a person within the meaning of this statute. The Court finds the argument and reasoning, although detailed and thorough, unpersuasive. SDCL 2-14-1, *Words used in ordinary sense* mandates what words used in the South Dakota statutes should be given their ordinary meanings. The ordinary meaning of the word person does not include the United States. Elsewhere in the statutes pertaining to the regulation of electric utilities, the United States was specifically mentioned (in addition to "person"). The Supreme Court of Mexico declined to include the United States in the definition of "person" within the meaning of their Public Utilities Act. *Southern Union Gas Co. v. New Mexico Pub. Ser. Comm'n*, 482 P.2d 913 (N. M. 1971).

For the reasons set forth in this Memorandum Opinion, BHP&L's motions for a preliminary injunction and for summary judgment in CIV 85-5031 will be denied. The Federal Government's motion to dismiss in CIV 85-5031 will be granted. CIV 85-3015 and CIV 85-5064 are rendered moot by this decision.

The only matter which now remains for this Court's resolution is intervenor BHP&L's motion to dismiss in CIV 85-5064. The Court believes that CIV 85-5064 raises issues which were put before this Court in the other actions. As a

consequence, the action is unnecessary. BHP&L's motion to dismiss will be granted.

Dated this 16th day of October, 1985.

BY THE COURT

ANDREW W. BOGUE

ANDREW W. BOGUE
SENIOR JUDGE

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF BLACK HILLS POWER AND LIGHT COMPANY AGAINST HEARTLAND CONSUMERS POWER DISTRICT WITH REGARD TO ELECTRIC SERVICE TO ELLSWORTH AIR FORCE BASE.	DECISION AND ORDER (F – 3513)

On the 29th day of November, 1984, Black Hills Power and Light Company ("Black Hills") filed a complaint against Heartland Consumer Power District ("Heartland") with regard to Heartland delivering electric service to the United States for use at its Department of Defense installation, Ellsworth Air Force Base, a military establishment located in Meade and Pennington Counties, South Dakota. Black Hills requested that Heartland be enjoined from delivering electric service to the United States at Ellsworth Air Force Base and that the Commission determine that Black Hills is entitled to be the sole supplier of electric service to Ellsworth Air Force Base, except for that electric service furnished by the United States. Heartland filed with this Commission an answer to the complaint requesting the Commission to dismiss the complaint claiming that the Commission does not have jurisdiction over the subject matter of the proceeding and that Heartland was within its jurisdictional rights in delivering electric service to Ellsworth Air Force Base in that it was a sale at wholesale and not resale and that Black Hills is estopped from claiming it is the sole supplier because it submitted a proposal to Ellsworth to deliver electric service.

On the 29th day on November, 1984, the Commission

issued an order for and notice of hearing with Black Hills' complaint attached, and caused the order for and notice of hearing to be delivered to Black Hills, Heartland, Ellsworth and West River Electric Association ("West River"). The Commission further ordered that Black Hills, Heartland, Ellsworth and West River are parties to the proceeding without the necessity of formal intervention. The Commission issued an amended order for and notice of hearing on December 10, 1984, and caused it to be delivered to all parties to the proceedings. In the amended order, the Commission found that it has jurisdiction over the proceedings pursuant to SDCL 49-34A generally, in SDCL 49-34A-4, 26, 27, 39, 42, 43, 44 and 59, specifically.

The Commission held a hearing on December 14 and 17, 1984 at Pierre, South Dakota, and on January 4, 1985 at Ellsworth Air Force Base, South Dakota. Black Hills, Heartland and the United States through Ellsworth directly participated in the proceedings and submitted evidence and argument in support of their positions. West River did not participate in the proceedings, but West River was personally present at the hearing held at Ellsworth Air Force Base, South Dakota. West River filed a letter with the Commission after the evidentiary hearing was closed stating West's River's position.

At the commencement of the hearing, Ellsworth orally made a motion for the Commission to dismiss the complaint on the grounds that the Commission lacks jurisdiction and the complaint failed to state a claim upon which relief may be granted. The specific grounds of Ellsworth's motion to dismiss were that the State of South Dakota has ceded jurisdiction of Ellsworth Air Force Base to the United States in accordance with SDCL 1 – 1 *et seq.*, that the Commission has no jurisdiction because of federal supremacy, that the State cannot interfere with federal procurement policy, federal procurement policies were followed and required competitive procurement, that Black Hills lacks standing to raise the complaint under South

Dakota law because it was not an affected utility, and that the Commission has no jurisdiction over Heartland under State law and that Heartland was under a duty to deliver electric service to Ellsworth Air Force Base. Heartland orally moved that the Commission dismiss the complaint because it had no jurisdiction over the matter in hearing, that Ellsworth Air Force Base has been ceded to the exclusive jurisdiction of the United States, and that the Commission has no jurisdiction over Heartland. Heartland later in the proceeding moved to dismiss the complaint on the grounds that the United States was not a party or customer under SDCL 49-34A-34. The Commission reserved rulings on the motions and received the evidence of all parties.

On January 4, 1985, all members of the Public Utilities Commission personally inspected Ellsworth Air Force Base and observed the structures and use of electric service being made on each side of the territorial boundary between Black Hills and West River. The parties simultaneously filed briefs in this matter on January 25, 1985.

The Commission has carefully reviewed the record, the evidence, testimony and the briefs. From the review of all such evidence, arguments and inspection, the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. *Black Hills.* Black Hills Power and Light Company ("Black Hills") is an investor – owned electric utility engaged in the generation, transmission, distribution and sale of electric power and energy to the Black Hills area of South Dakota in addition to service in the States of Wyoming and Montana.

2. *Heartland.* Heartland Consumers Power District ("Heartland") is a public corporation and political subdivision of the State of South Dakota, formed as a consumers power district under the provisions of SDCL ch. 49-35. The

governmental district boundaries of Heartland are totally contained within an area east of the Missouri River in the State of South Dakota, and the nearest boundary thereof is approximately 200 miles from Ellsworth Air Force Base. The exact boundaries are shown by Black Hills' Exhibit 10 which is made a part hereof by express reference.

3. *West River.* West River Electric Association ("West River") is a rural electric cooperative and a public utility which renders electric service to customers in an area located adjacent to and east of the service territory of Black Hills.

4. *Ellsworth.* Ellsworth Air Force Base is a military installation operated by the Department of Defense of the United States located in parts of Meade and Pennington Counties, South Dakota, east of Rapid City, South Daktoa. The term "Ellsworth" when used herein shall refer to the United States Government, a party to this proceeding.

5. *Base.* Ellsworth Air Force Base ("Base") for the purpose of this hearing shall be deemed to be that contiguous territory being operated by Ellsworth as a defense military establishment. That contiguous territory is shown by various maps admitted into evidence herein. Those maps which show the contiguous territory constituting the Base, all of which are made a part hereof, include Black Hills' Exhibits 3 and 12. The Commission finds that the Renel Heights housing area, the Skyway housing area, and the Capehart 190 and Capehart 500 housing area are all deemed to be a part of the Base. The four Nike sites located a few miles north, south, east and west of the Base are not contiguous and are not deemed to be a part of the Base for the purposes herein.

6. *Base areas ceded to United States.* That part of the Base the jurisdiction of which was ceded to the United States pursuant to SDCL 1–1–1 *et seq.* is colored red, green and blue on the map attached to Black Hills' Exhibit 15F except for that parcel on which is written "no Juris"

and the parcel which has a circled 61 thereon in Section 2, Township 2, Range 8, colored green. Those areas of the Base on the map attached to Black Hills' Exhibit 15F which are not colored were not ceded to the United States but remain under the jurisdiction of South Dakota.

7. *Assigned Service Areas.* The area occupied by the Base was assigned as service area pursuant to SDCL 49-34A-43 and 49-34A-44 to Black Hills and West River. That area of the Base assigned as the service area of Black Hills is all of that area south of the line and designated as Black Hills' Exhibit 3. The dividing line between the two service areas is the east–west quarter section lines of Section 7 and the west half of Section 8 of Township 2 North, Range 9 East and Section 12 of Township 2 North, Range 8 East, all in Meade County, South Dakota. See Black Hills' Exhibit 15F.

8. *Electric Service to Base on March 21, 1975.* On March 21, 1975, electric service to the Base was being furnished by the Western Area Power Administration ("WAPA") and Black Hills, and WAPA and Black Hills have continued to provide all of the electric service to the Base from March 21, 1975 to this date, excluding the recent contested Heartland deliveries.

9. *Electric Service to Base at the Time This Action Arose.* Electric service to the Base at the time this action arose was furnished by two suppliers, WAPA and Black Hills. The Black Hills deliveries were made and are continuing to be made through its substation located in the Renel Heights housing area of the Base and the WAPA deliveries were made and are continuing to be made at a WAPA substation located at the north part of the Base.

10. *Ellsworth's Need for Additional Electric Service.* Ellsworth has been obtaining electric service from WAPA at a demand which has reached approximately 2,000 kilowatts in excess of the demand allowed and allocated by WAPA for Ellsworth. See Black Hills' Exhibit 5.

11. *Procedures to Meet Needs of Supplemental Electric Service.* In order to acquire supplemental electric service and to cease overrunning the demand allocated by WAPA, Ellsworth was required to follow the regulations contained in the Department of Defense Document "Armed Services Procurement Regulation Supplement No. 5, Procurement of Utility Services", Black Hills Exhibit 8. Ellsworth failed to follow the provisions of Supplement No. 5, including S5-102, S5-103.2 (a), S5-103.3 and 5104.1 (a)(b). Ellsworth did not determine the existence of franchised electric service areas to determine which electric utility was entitled to serve the excess electric service requirements, but instead requested proposals from several electric suppliers, including Black Hills and Heartland, who could physically cause the supplemental electric service to be delivered to Ellsworth.

12. *Black Hills and Heartland Submitted Proposals.* Black Hills and Heartland submitted proposals to Ellsworth to serve the supplemental power for the Base. The Black Hills proposal priced the supplemental power at the rate which has been previously approved by the Commission. Black Hills' rate was priced higher than the price of the power proposed by Heartland.

13. *Ellsworth Contracted with Heartland.* Upon receiving said proposals, Ellsworth awarded a one year contract to Heartland for Heartland to provide supplemental electric service to Ellsworth for the Base in the amount to satisfy Ellsworth's needs in excess of its WAPA allocation.

14. *Electrical Service to Base at This Time.* Heartland is now causing electric service to be delivered to the United States, who in turn delivers the electric power and energy to Ellsworth. At Ellsworth this electric power is commingled with power and energy furnished by WAPA and utilized by Ellsworth throughout the entire Base, including service in the assigned service areas of both Black Hills and West River and including those parts of the Base which

have been ceded to the Unted States and which have not been ceded to the United States. The Black Hills deliveries are continuing to be made through its substation located in the Renel Heights housing area of the Base. WAPA deliveries are continuing to be made at a WAPA substation located at the north part of the Base.

15. *Location of Electric Power Use on Base.* From the evidence presented and from the personal inspection of the Commission, the Commission finds that a majority of the electric power and energy used on the Base is used in that part of the Base which is a part of Black Hills' assigned service area.

16. *Electric Service to Base is a Retail Sale.* Electric service delivered to the Base, whether it is from the United States through WAPA, from Black Hills, or from Heartland, is electric service furnished to the Base for ultimate consumption, and is not wholesale electric service furnished by an electric utility to another electric utility for resale. Ellsworth utilizes electric power and energy for the purpose of constructing, operating and maintaining a strategic air command military defense installation. Accordingly, all uses of electricity on the Base are connected either directly with that purpose or incidentally to furnishing housing and services to personnel engaged in the operation of the defense military installation. Any exceptions to this finding would be an extremely small consumption of electric power and thus would be inconsequential to the primary use of electric power and energy. Any such use would be *de minimis.* According to the evidence, the only non – federal use of electric power and energy on the Base would be that of the Black Hills Federal Credit Union and other small contractors consisting of small specialty shops.

17. *Appropriated Funds Versus Non -- appropriated Funds Payment for Electric Power.* During the last fiscal year ending September 30, 1984, Ellsworth used ap-

proximately 56, 403, 504 kilowatt hours of electricity to serve the Base. Black Hills Exhibit 11 (page 3, grand total less West River and Ellsworth Nike sites). Ellsworth allocated all "electric utility distributions" at a cost determined by Ellsworth to be for federal agencies. The one exception was a contract numbered ELS-8 with Ellsworth Air Force Base Credit Union which purchased only 116,080 kilowatt hours during fiscal year 1984, or only 0.2% of the total electric energy use during the same fiscal year. See Ellsworth Exhibit 9. The electric energy used on the Base for fiscal year 1984 which was paid for by non–appropriated funds was 3,741,739 kilowatts. Black Hills Exhibit 11 (page 1, total of B, less contract ELS-16 and ELS-17. This is approximately 7% of the entire electric energy utilized on the Base during the 1984 fiscal year. This leaves 93% of electric energy being paid for by appropriated funds from the United States Congress. Black Hills Exhibit 11: Ellsworth Exhibits 9 and 21.

18. *Black Hills is Able to Provide Additional Electric Service.* According to the evidence, Black Hills is ready, willing and able to provide additional electric service to Ellsworth for use on the Base by three methods: (1) Black Hills could connect additional portions of the facilities within the Base to its present system and serve additional load; (2) Black Hills could construct an additional substation and transmission facilities in order to serve other portions of the Base; and (3) Black Hills could enter into an agreement with WAPA wherein Black Hills delivers power for WAPA loads at other locations and WAPA delivers power for Black Hills to Ellsworth for use on the Base. Black Hills was in the process of making arrangements with WAPA at the time Ellsworth informed Black Hills that Heartland would furnish Ellsworth additional requirements. While Black Hills has not made an arrangement with WAPA at this time, there is no evidence in the record that Black Hills cannot make such an arrangement with WAPA. Black Hills has similar arrangements

with WAPA in delivering WAPA power allocated from an eastern source to the South Dakota School of Mines and Technology and the South Dakota Cement Plant in Rapid City, South Dakota, on the west.

From these Findings of Fact, the Commission makes the following conclusions of law.

CONCLUSIONS OF LAW

I.
Defined Parties

Each of Black Hills, Heartland and West River is an "electric utility" and "public utility" as defined, respectively, at SDCL 49-34A-1 (7) and (12). Ellsworth is not a city or a municipality, but is the United States Government which operates a strategic air command military establishment at the Base.

II.
Jurisdiction

(1) Commission jurisdiction over Black Hills, Heartland and West River:

The Commission has jurisdiction over Black Hills, Heartland and West River for the purpose of determining customers at specific locations and service areas within which each of said electric utilities are entitled to serve under the provisions of SDCL 49-34A-42 through 49-34A-44.

(2) Commission jurisdiction over Ellsworth:

While the Commission herein does not attempt to exercise any jurisdiction over the United States through its operations through Ellsworth at the Base, the Commission does exert its jurisdicition over Black Hills, Heartland and West River in determining who has the right to furnish electric service to the Base. Even if that part of the Base which was ceded to the United States is under the United States is not within the jurisdiction of the Commission,

that part of the Base which was not ceded to the United States is under the Commission's jurisdiction, and in order to control the delivery of electric power and energy which is commingled and served throughout the entire Base, it is necessary for the Commission to control the whole.

The Commission determines that the United States Congress has preempted the regulation of the delivery of electric service when it comes to wholesale sales under the Federal Power Act. The United States, however, has not preempted the entire scheme of the regulation of the generation, transmission and distribution of electric power and energy, and has left the regulation of retail sales, service territories and retail rates under the jurisdiction of the states. The prevention of unnecessary duplication of electric facilities is the primary goal of the regulation of service territories as promulgated under SDCL 49-34A. This regulation of service territories left to the states would be unworkable if every federal installation within the state, whether it is in a federally ceded enclave or not, could obtain power from the electric supplier of its choice.

Further, the United States through its regulations at 48 C.F.R. Chapter 2 which incorporates by reference Armed Services Procurement Regulation Supplement No. 5 Procurement of Utility Service Dated October 1, 1974 (Black Hills' Exhibit 8) specifically recognizes and agrees to abide with local regulation of franchise or service territories. The regulation clearly direct procurement officers to ascertain the existence of franchised territories before requesting proposals for competitive bids. From this the Commission concludes that the United States recognizes the Commission's jurisdiction over this matter and further concludes that the Commission has jurisdiction to determine which electric utility has authority to deliver electric service to the Base.

(3) Commission's jurisdiction over WAPA:

The Commission makes no attempt to exercise its

jurisdiction over WAPA, an agency of the United States, and has no jurisdiction to restrict the amount of electric service generated by the United States through WAPA and distributed for use by the United States at the Base.

III.

Black Hills is an Affected Utility

Black Hills is an affected utility under the provisions of SDCL 49-34A-59 by the act of Heartland furnishing electric service to Ellsworth. Accordingly, Black Hills had the right to file a complaint thereunder concerning the illegality of such service.

IV.

Electric Service to Base is Retail

The furnishing of electric power and energy to Ellsworth for use on the Base constitutes "electric service" within the meaning of SDCL 49-34A-1 (6) which is electric service furnished to a customer (Ellsworth) for ultimate consumption. Such service is not wholesale electric service which is furnished by an electric utility to another electric utility for resale. The United States through Ellsworth is not an "electric utility" within the meaning of SDCL 49-34A-1 (7) because it does not resell the electric service nor provide electric service to or for the public. All electric power and energy distributed by Ellsworth to operate the Base is not for the public but is for the purposes of operating and maintaining a military establishment on behalf of the United States. Ellsworth does cause small quantities of electric power and energy to be sold to non-federal entities, but these small amounts are only 0.2% of the whole. Consequently, these small amounts are *de minimis* and not significant in order to change the character of the electric service being sold at retail. The allocation of costs of utility service among federal agencies does not constitute a resale within the meaning of SDCL 49-34A-1 (6).

V.

The Base is One Location

The Base is a contiguous parcel of land which has been in existence before March 21, 1975, and is continuing today as one "location" as referred to under the provisions of SDCL 49-34A-42. The Base as one location constitutes not only a contiguous parcel of land, but contains a commonality therein of purpose in the operation of a strategic air command military establishment of the United States. The Nike sites, while used as housing in conjunction with the Base, are located within several miles of the Base and are not contiguous. For that reason, the Nike sites constitute separate locations within the meaning of SDCL 49-34A-42. The Base as a location constitutes one customer, Ellsworth.

VI.

Heartland Has No Authority To Serve Retail

Heartland is prohibited from serving electric service to the Base for two reasons: (1) The sale of electric service to the Base is a retail sale and Heartland does not have authority to sell electric power and energy at retail outside of its jurisdictional boundaries under the provisions of SDCL 49-37-3; and (2) Heartland was never assigned any assigned service area as provided at SDCL 49-34A-43 and 49-34A-44. Accordingly, Heartland's furnishing electric service to Ellsworth for use at the Base is illegal and unauthorized and in violation of the above-cited laws. Since Heartland's furnishing electric service to Ellsworth for use at the Base is illegal, the contract between Heartland and Ellsworth is void.

VII.

The Base is a Location to be Served By Black Hills

The base is one location under the provisions of SDCL 49-34A-42, and Ellsworth is a customer requiring electric

service at said location. Since Black Hills was serving the customer, Ellsworth, at this one location, the base, on March 21, 1975, and since Black Hills has served the customer at that location since March 21, 1975, Black Hills is entitled to be the exclusive provider of electric service to Ellsworth for use at the Base. The Commission has no authority to restrict the United States through WAPA to furnish electric power and energy produced by the United States to a United States installation, Ellsworth; but, to the extent that Ellsworth requires power in excess of that power furnished by the United States through WAPA, Ellsworth is required to obtain that electric power and energy from Black Hills.

VIII.

Majority of Load in Black Hills' Territory

Delivery of Black Hills' electric power and energy to the Base is in Black Hills' assigned service area and delivery of power by the United States through WAPA is in West River's assigned service area. As this Commission has previously ruled in *In Re Black Hills Power and Light Company Against Butte Electric Cooperative*, Docket F-3281, December 4, 1978, the place of delivery is not the determinative factor in determining the electric utility entitled to serve a customer at a particular location. Where one location crosses assigned service areas, the Commission does consider significant where the majority of a load of that customer at that location is utilized. *See O'Brien Cty, Rural Elect. v. State Com. Com'n*, 352 NW2d 264 (Iowa 1984). Because of the lack of metering, Ellsworth was unable to determine the amount of electric power and energy now being used in Black Hills' assigned service area as opposed to West River's assigned service area. Ellsworth contends that after new facilities are constructed in the next several years that the majority of the load will be utilized in West River's assigned service area. To evaluate where a majority of the load is utilized, the Commission reviewed the evidence offered by the parties

and made a personal inspection of the Base, both on the ground and by helicopter. The Commission personally observed that at this time a majority of the activity of the Base requiring electric service appears to be Black Hills' assigned service area. Therefore, the Commission concludes that in addition to the reason that the Base is a customer of Black Hills under SDCL 49-34A-42, that because the Base is one location and because the majority of the load is in Black Hills' assigned service area, that the Base should be served by Black Hills solely, notwithstanding the fact that a portion of the Base is in West River's assigned service area.

IX.

Large Load Exception

While West River did not participate in the proceedings, it was given notice of the proceedings and did audit a portion of the proceedings. West River contended after the hearing was over that if Heartland were not allowed to continue electric service to the Base that West River should have the customer because of the large load exception set forth at SDCL 49-34A-56. However, the Commission concludes that Ellsworth is not a new customer and the Base is not a new location which developed after March 21, 1975, as referenced in SDCL 49-34A-56. Therefore, the large load exception does not apply to the determination as to what electric utility is entitled to furnish electric service to the Base.

X.

Black Hills' Submission of a Proposal Does Not Operate as Estoppel

Black Hill's submission of a proposal to Ellsworth setting forth a rate previously approved by this Commission does not estop Black Hills from asserting its position in this proceeding. Neither Ellsworth, Heartland, nor West River relied on any actions of Black Hills in submitting such proposal to their detriment, nor was Black Hills dilatory

in any way in asserting its position as soon as it became aware of the need for supplemental power and Heartland's proposal to furnish electric service to the Base. None of the facts of this case operate to estop Black Hills from being entitled to its legal rights.

XI.

United States Cannot Enlarge Authority of Subdivision of State Government

If the Commission did not enjoin Heartland from furnishing electric service to the Base, the Commission would be allowing the United States Government through Ellsworth to enlarge the authority of a subdivision of state government, Heartland. The Commission concludes that such actions of the United States through Ellsworth is in violation of the constitutionally reserved powers of the states as provided by the Tenth Amendment to the United States Constitution.

XII.

Continuity of Service

Although the contract between Heartland and Ellsworth is void due to its illegality, the Commission recognizes the need for continuity of adequate and reliable service to Ellsworth for use at the Base until Black Hills has arranged to supply the electrical power needs of Ellsworth. Accordingly, Heartland may continue to supply this electric power to Ellsworth until notification by Black Hills to Heartland and Ellsworth that Black Hills is prepared to supply the power to Ellsworth. It is therefore

ORDERED, that all motions of Ellsworth and Heartland to dismiss the complaint be, and they are hereby denied; and it is

FURTHER ORDERED, that Black Hills Power and Light Company, an electric utility, is the electric utility which is entitled to furnish, and from which Ellsworth shall acquire, all of the electric power and energy needs

of the United States at that part of Ellsworth Air Force Base referred to in these findings as the "Base"; and it is

FURTHER ORDERED, that nothing in this order shall be interpreted to restrict the United States from using at the Base electric power and energy which is generated by United States – owned facilities through its agency, the Western Area Power Administration (WAPA); and it is

FURTHER ORDERED, that to assure continuity of service, Heartland Consumers Power District may continue furnishing electric power and energy to Ellsworth for use at the Base until Black Hills is prepared to furnish such electric power and energy and notifies Heartland Consumers Power District and Ellsworth that Black Hills is so prepared; and it is

FURTHER ORDERED, that when Black Hills notifies Heartland Consumers Power District and Ellsworth that all preparations are complete to serve Ellsworth, that Heartland Consumers Power District shall at that time be enjoined from furnishing any electric power and energy for use by the United States at Ellsworth Air Force Base located in Meade and Pennington Counties, South Dakota.

Dated at Pierre, South Dakota, this 4th day of February, 1985.

BY ORDER OF THE COMMISSION:

_____

KENNETH STOFFERAHN, Chairman

_____

JEFF SOLEM, Commissioner

_____

DENNIS EISNACH, Commissioner

(OFFICIAL SEAL)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
JUDGMENT

Filed
Feb. 20 1987
/s/ WILLIAM F. CLAYTON
clerk

Nos. 85 – 5418/5428SD

Black Hills Power and Light Company, etc.,
Appellant/Cross--Appellee,
vs.
Caspar W. Weinberger, etc., et al.,
Appellee/Cross--Appellant.

Appeals from the United States District Court for the District of South Dakota.

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

January 7, 1987

Cost of briefs of appellees' Heartland Consumers Power District, et al., for recovery from appellants; $ 303.60.

Costs of briefs of federal appellees for recovery from appellants; $ 360.00.

A True Copy.

ATTEST: /s/ ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals, Eighth Circuit.

MANDATE ISSUED 2/17/87

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85 – 5418/5428-SD

Black Hills Power and Light Company, etc.,

Appellant,

vs.

Caspar W. Weinberger, etc., et al.,

Appellees.

Appeal from the United States District Court for the District of South Dakota.

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

February 4, 1987

Order Entered at the Direction of the Court:

/s/ ROBERT D. ST.VRAIN

Clerk, United States Court of Appeals, Eighth Circuit

ARMED SERVICES PROCUREMENT REGULATION
SUPPLEMENT NO. 5
PROCUREMENT OF UTILITY SERVICES

1 OCTOBER 1974

DEPARTMENT OF DEFENSE

ARMED SERVICES PROCUREMENT REGULATION

SUPPLEMENT NO. 5
PROCUREMENT OF UTILITY SERVICES

FOREWORD

The Armed Services Procurement Regulation Supplement No. 5 entitled "Procurement of Utility Services" is issued by direction of the Assistant Secretary of Defense (Installations and Logistics) pursuant to the authority contained in Department of Defense Directive No. 4105.30, dated March 11, 1959, and in Title 10, United States Code 2202.

This Supplement is issued pursuant to paragraph 1-103.6 for the guidance of Department of Defense personnel engaged in the procurement and administration of contracts for utility services; standby, emergency, exchange, and interchange services; and all other operating arrangements with utility suppliers. It prescribes uniform policy, procedures, and contract formats applicable to procurement of the several types of utility services from both public and private sources.

This edition supersedes the Supplement No. 5 dated 1 September 1968. Its primary purpose is to incorporate the various changes and additions approved by the ASPR Committee and these are indicated by vertical lines in the right hand margins.

Copies of the ASPR Supplement No. 5 may be obtained by purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

PROCUREMENT OF UTILITY SERVICES (ASPR SUPPLEMENT NO. 5)

S5-000 Scope of Supplement. This Supplement contains policy, procedures, and contract formats for the procurement of utility services. For the purpose of this Supplement communication services are not considered utility services.

S5-001 Applicability.

(a) Except as provided in (b) below, this Supplement is applicable to the direct purchase of utility services; the procurement of standby, emergency, exchange, and interchange services; and all other operating arrangements with utility suppliers.

(b) This Supplement is not applicable (i) to procurements of rights in real property, procurement of public utility facilities, or construction or maintenance of Government-owned facilities; or (ii) when a General Services Administration (GSA) area contract is adequate to meet the requirements of the using activity, in which case the procedures in Section V, Part 8, shall be followed.

Part 1-Policy

S5-101 Definitions.

S5-101.1 *Utility services* means services such as the furnishing of electricity, gas, water, steam, and sewerage that are available to the general public and performed by governmental agencies or by private companies ordinarily subject to governmental regulations. This also includes other services such as snow removal and the removal or disposal of garbage, rubbish, and trash, when the services are performed by public agencies or utilities on a contractual basis and are subject to public regulation.

S5-101.2 *Connection charge* means a payment by the Government for special or local facilities which are required in order to make connections with the nearest point of supply and which are installed and owned by the utility

supplier.

S5-101.3 *Termination liability* means a contingent obligation to pay the unamortized portion of special or local connecting facilities, installed and owned by the utility supplier, in the event the Government terminates the contract prior to expiration of its term.

S5-101.4 *Multiple service locations* means the various locations or delivery points in the contractor's service area to which he provides service under a single contract.

S5-102 General. Utility suppliers may be quasi-public service corporations, private concerns, municipalities, associations, or cooperatives. They generally operate in a franchised territory without competition, so they may frequently be in a "sole source" position. Under common law, however, public utilities must render service at reasonable rates and without unjust discrimination. Furthermore, their operations, management, rates, and profits are usually regulated by Federal, state, or local regulatory bodies, but absence of a regulatory body does not necessarily mean a complete lack of control. Administrative remedies pursuant to enabling statutes may be pursued or complaints may be taken to a court of competent jurisdiction. In instances where such remedies are to be taken, authorization shall be obtained from the Chief of Engineers for the Army; the Commander, Naval Facilities Engineering Command for the Navy; or Headquarters USAF (AF/LGPLA) for the Air Force; the Executive Director of Procurement and Production, for DSA; or their designees.

S5-103 Policy.

S5-103.1 *Agreements With Other Government Agencies.*

(a) In the procurement of utility services, first preference is given to cross-servicing within the Department of Defense or other Federal agencies, provided procurement in this manner will not decrease military effectiveness or result in higher cost to the Government.

PROCUREMENT OF UTILITY SERVICES

(b) In procurement of utility services from the Federal agencies, the authorization and procedures in Section V, Part 7, are applicable.

(c) Departments may use delivery orders (DD Form 1155) to secure utility service from another Federal agency. Where continuing and complex service is involved, a written agreement should be made, which may take the form of an Interservice Support Agreement (DD Form 1144) or a Memorandum of Understanding.

S5-103.2 *Procurement from Utility Suppliers.*

(a) The Department of Defense procures utility services from industries which are, to a greater or lesser extent, regulated by Federal, state, and local regulatory bodies. Notwithstanding the other provisions of this Regulation, as to those matters over which the appropriate regulatory body has taken jurisdiction, it is the policy of the Department of Defense, as a matter of comity rather than law, to comply with the current regulations, practices, and decisions of that body concerning accounting practices, allowability of costs pricing, and rates, subject to judicial appeal through the normal channels. As to those matters concerning which the regulatory body has not accepted jurisdiction or has not spoken, or for which there is no appropriate regulatory body, the rules of the Federal Power Commission and the general practices of the particular utilities industry as to accounting practices, allowability of costs, pricing, and rates shall be followed. This policy does not extend to the regulations, practices, or decisions of regulatory bodies whose decisions are not subject to judicial appeal, nor does it extend to those agencies which are regulating utilities owned or operated by the same Governmental entity which has established the regulatory body.

(b) Except where procurement of utility services without a formal contract is authorized by Part 2 of this

Supplement, the formats in Part 2 shall normally be used. However, because of the differences in public regulation and practices in different areas, the terms and conditions under which utility suppliers furnish service vary from area to area. Flexibility in the use of contract formats is therefore necessary. Accordingly, reasonable variations from the formats and the general and technical provisions in Part 2, except as provided in (c) below, are authorized in accordance with S5-203(b). The Departments may use special clauses and service specifications as necessary, when authorized in accordance with S5-203.

POLICY

(c) Any deviation from the standard clauses referenced in paragraphs 8 through 21 of the General Provisions must be authorized in accordance with 1-109.

(d) Similarly, when utilities services are being procured outside the United States, its possessions, and Puerto Rico, the formats and technical provisions in Part 2 may be varied in accordance with local practice, provided approval is secured pursuant to S5-203.

(e) Contracts for utility services shall show on the cover page (see S5-203.1) whether the premises are Government-owned or leased, and, if leased, the lease instrument shall be identified thereon. If the utility service is part of the lease consideration, no separate utility service contract shall be made.

(f) Utility services for activities occupying property controlled or operated by another Federal agency shall be procured under separate utility contracts only if the services are available from neither the GSA nor the operating Federal agency.

S5-103.3 *Cost or Pricing Data.* Rates or preliminary estimates quoted by utility suppliers for service for which the rates are established by an effective, independent regulatory body are considered "prices set by law or

regulation" even if the rate will not be formally established until after the execution of the contract. Accordingly, such utility suppliers are not required under 3-807.3 to submit cost or pricing data for such services prior to the awarding of the contract. On the other hand, rates or preliminary estimates quoted by a utility supplier for service for which the rates are not established by an effective, independent regulatory body are not considered "prices set by law or regulation" even though the supplier itself may be subject to regulation. The provisions of 3-807.3 which relate to the "prices set by law or regulation" exception from the requirement for the submission of cost or pricing data shall be applied in accordance with the above guidance; the provisions of 3-807.3 relating to the other exceptions are not affected by this paragraph.

PROCUREMENT OF UTILITY SERVICES

S5-104 Competitive Procurement of Utility Services.

S5-104.1 *Determination as to Existence of Competition.*

(a) Although in most instances utility service suppliers operate in franchised territory, competition may nevertheless exist–for example, where more than one supplier is franchised for a given location, or where more than one supplier is able to provide service at a given location but no supplier has yet been franchised for that location. Therefore, when the location of a new military installation has been determined and the procurement of utility services is authorized, the contracting activity shall determine whether more than one supplier can provide the service. Where competition exists, proposals shall be solicited from all potential suppliers. Even where one of the competing potential suppliers has entered into a GSA area contract, proposals shall be solicited to determine definitely which of the suppliers offers more advantageous competing services under the particular circumstances.

(b) Similarly, where an existing installation is being served by one supplier, and either another prospective sup-

plier requests an opportunity to furnish the service or the Department concerned becomes aware of another potential supplier, the Department shall determine whether more than one supplier can provide the service. Where competition is found to exist, competitive solicitation of proposals shall be initiated at whatever time is considered to be most advantageous to the Government.

S5-104.2 *Solicitation of Proposals.* In addition to the applicable requirements of 3-501, requests for proposals shall be in writing and shall contain such of the following as are appropriate:

(i) a copy of the applicable contract format (see Part 2);

(ii) a requirement that offerors submit their estimated monthly costs to the Government for a period of 12 consecutive months based on the estimated quantities, and the proposed rates and charges based thereon;

PROPOSED RULES
51 Sed. Reg. 16988-16991
(May 7, 1986)

PART 41-UTILITY SERVICES

41.000 Scope of part.

Subpart 41.1–Acquisition of Utility Services

41.1001 Definitions.
41.102 Applicability.
41.1003 Statutory authority.
41.104 Acquisition policy.
41.1005 Acquiring utility services.
41.105-1 GSA assistance.
41.105-2 GSA areawide contracts.
41.105-3 Separate contracts.
41.10-5-4 Consolidated purchases, joint use, or cross-services.
41.106 Post-contract review.
41.107 Guidelines and data for GSA contract assistance and review.
41.106 Agency implementation.
41.108 Contract clauses.

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2453(c).

41.000 Scope of part.

This part prescribes policies and procedures for the economic and efficient acquisition of utility services (excluding telecommunication services).

Subpart 41.1–Acquisition of Utility Services

41.101 Definitions.

"Areawide contract," as used in this subpart, means a basic ordering agreement (see 16.703) entered into between the General Services Administration (GSA), and a utility service supplier to cover the utility service acquisitions by

Federal agencies.

"Authorization," as used in this subpart, means the ordering document under an areawide contract issued by an authorized contracting officer for the acquisition of the required utility services (see 16.703(d)).

"Connection charge," as used in this subpart, means a payment to the utility supplier by the Government for the installation of facilities which are required to make connections to the nearest point of supply (see Termination liability).

"Delegated agency," as used in this subpart, means an agency that has received a written delegation of authority from GSA to contract for utility services.

"Separate contract," as used in this subpart, means a utility services contract to cover the acquisition of utility services for a specific delivery point(s).

"Termination liability," as used in this subpart, means a contingent obligation to pay the unamortized costs of connecting facilities, which are installed and owned by the utility supplier. This obligation becomes operative in the event the Federal Government terminates the contract prior to the time required to satisfy the contingent obligation provisions of the contract (see Connection charge).

"Utility services," as used in this subpart, means the furnishing of services such as electricity, gas, water, sewage, and steam. These services shall include but are not limited to public utility services. The application of utility service contracts to other services may be appropriate when the contract is not subject to the Service Contract Act of 1965 (see 37.107).

41.102 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart applies to the acquisition of utility services, including connection charges.

(b) This subpart does not apply to–

(1) Utility services produced, distributed, or sold by a Federal agency;

(2) Utility services (other than those required for administrative purposes) obtained by purchase, exchange, or otherwise by a Federal power or water marketing agency incident to that agency's marketing or distribution program; or

(3) Cable television (CATV), nonfossil fuel energy development, telecommunication services, and contracts leading to beneficial construction for the Government.

41.103 Statutory authority.

(a) The Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 481), authorizes the General Services Administration (GSA) to provide Federal agencies with an economic and efficient system for the management and acquisition of utility services. GSA has statutory authority to enter into long-term contracts for utility services for periods not to exceed a term of 10 years (40 U.S.C. 481).

(b) The Department of Defense (DOD) has authority to acquire utility services for military facilities (10 U.S.C. 2304 and 40 U.S.C. 474(3)) and to enter into long-term contracts for energy and fuel for periods of up to 30 years (10 U.S.C. 2394).

(c) The Department of Energy Organization Act (42 U.S.C. 7251) provides for the Department of Energy (DOE) to enter into contracts not to exceed 10 years for the acquisition of gas and electric utility services for Energy Research and Development Administration Programs and the Atomic Energy Act of 1954, as amended (42 U.S.C. 2204), provides for DOE to enter into new contracts or modify existing contracts for electric services for periods not exceeding 25 years for uranium enrichment installations.

41.104 Acquisition policy.

(a) Agencies shall perform acquisition planning in accordance with Part 7 to promote and provide for full and open competition (see Part 6).

(b) The existence of franchised service territories is not a justification for the acquisition of utility services on a "Sole Source" basis (see 6.302-1).

(c) The contracting officer should consider, as part of the market survey, the following sources:

(1) GSA areawide contracts.

(2) Separate contracts.

(3) Consolidated purchases.

(4) Joint use.

(5) Cross-service arrangements.

(d) The contracting officer shall acquire utility services by contract, including the clauses required by 41.109, whether or not rates or conditions of service are fixed or adjusted by a Federal, State, or other regulatory body.

(e) The contracting officer may not use the utility supplier's forms and clauses to avoid the provisions and clauses required by 41.109.

41.105 Acquiring utility services.

This section describes methods by which utility services may be acquired.

41.105-1 GSA assistance.

(a) GSA will, upon request furnish the services provided for in this subpart to any Federal agency, mixed ownership Government corporation, the District of Columbia, the Senate, the House of Representatives, or the Architect of the Capitol.

(b) Except as otherwise specified, agencies shall submit all information required by GSA under this subpart to the Office of Procurement, Public Buildings Service, General

Services Administration, Washington, DC 20405.

(c) The nondelegated agencies shall come to GSA for assistance when–

(1) The annual cost of the service to be acquired is estimated by the using agency, at the time of initiation of the service or annual review, to exceed $150,000 for separate contracts or $250,000 for "Authorizations" under effective areawide contracts; or

(2) A proposed connection charge, termination liability, or other facilities charge to be paid by the agency (whether or not refundable) is estimated to exceed $75,000 for separate contracts or $125,000 for "Authorizations" under effective areawide contracts.

(d) Nondelegated agencies shall forward such requests for review and technical assistance to GSA 120 days prior to the initiation of new services or expiration of any current contract.

41.105-2 GSA areawide contract.

(a) GSA enters into areawide contracts with utility suppliers for use by all Federal agencies in the acquisition of utility services within the supplier's service area. A Federal agency may request GSA to negotiate an areawide contract.

(b) An areawide contract requires the utility services supplier, upon execution of the "Authorization" under the areawide contract, to furnish the needed services without further negotiations at the supplier's current published or unpublished rates.

(c) The areawide contract may not be used to avoid competition (see 16.703).

(d) Following the "market survey," if the contracting officer determines that the utility supplier with an effective areawide contract is a "Sole Source," the agency should acquire utility services under the areawide contract (see 6.302-1(b)(3)). Rates and services of a special nature may

be obtained under the areawide contract by executing an expanded "Authorization."

(e) Upon request, GSA will furnish agencies a list of the current areawide contracts showing the kinds of utility services, and the geographical areas served. GSA will also provide a copy of any areawide contract upon request. Each areawide contract includes an "Authorization" form for requesting service, connection, disconnection, or change in service.

(f) When utility services are acquired under an areawide contract, the ordering agency shall use the "Authorization" attached to the appropriate GSA areawide contract in lieu of the Optional Form (OF) 347 for requesting service, connection, disconnection, or change in service. The "Authorization" may be added to, in the form of an addendum, to satisfy the fiscal and administrative requirements of the agency.

(g) The contracting office acquiring utility services under an areawide contract shall perform the annual post contract review of each "Authorization," as required by 41.106.

(h) The contracting office acquiring utility services under an areawide contract shall furnish to GSA at the address shown in 41.105-1(b) a fully executed copy of the "Authorization" requesting service, connection, disconnection, or change in service within 30 days after execution by the utility supplier and the agency.

41.105-3 Separate contracts.

(a) Contracts shall be entered into with the utility supplier to acquire utility services, within the scope of each Federal agency's acquisition authority. GSA has implemented a technical assistance and utility acquisition assistance program on behalf of the nondelegated agencies. A Federal agency may request GSA to negotiate a separate contract on its behalf.

(b) GSA has delegated its long-term authority for utility services contracts up to 10 years to DOD, and partially delegated its long-term authority to DOE and the Veterans Administration. Conditions for acquisition under long-term contracts shall be determined by the specific delegation of authority from GSA to the agency. Nondelegated agencies may request a direct delgation of authority to acquire utility services from GSA at the address shown in 41.105-1(b)

(c) When GSA initiates or is requested to negotiate a separate contract for a nondelegated agency, the requesting agency shall furnish the following information to GSA:

(1) The technical and acquisition data required in 41.107.

(2) Such other technical data as GSA may request to complete the contract.

(d) In determining whether to negotiate a separate contract, consideration should be given to the following:

(1) The utility supplier's rates in light of the magnitude of the services required.

(2) Any unusual characteristics of services required.

(3) Any special equipment or facility requirements.

(4) Any special technical contract terms required by the agency.

(e) A long-term contract may be justified and is usually required by any of the following circumstances:

(1) The Government will obtain lower rates, larger discounts, or more favorable conditions of service.

(2) A proposed connection charge, termination liability, or any other facilities charge to be paid by the Federal Government will be reduced or eliminated.

(3) The utility service supplier refuses to render the desired service except under a long-term contract.

41.105-4 Consolidated purchase, joint use, or cross-service.

Agencies shall use consolidated purchase, joint use, or cross-service to acquire utility services or facilities in accordance with the policies and procedures at Subpart 17.5, Interagency Acquisitions Under the Economy Act.

Use of an interagency agreement to acquire utility services requires a Memorandum of Understanding or other appropriate document to specify the services or facilities to be supplied, the estimated costs, and other conditions under which they will be acquired.

41.106 Post-contract review.

Agencies are responsible to review bills for utility services on a monthly basis and each contract or "Authorization" on an annual basis to ensure that the utility supplier is providing services and is billing each facility for the services furnished under the utility's most economical and applicable rate. The review should be based upon the facility's usage, conditions, and characteristics of service, at each individual delivery point, for the most recent 12 months. If a change in rate is appropriate, the Federal agencies will request the supplier to make such rate change immediately.

41.107 Guidelines and data for GSA contract assistance and review.

(a) All contracting offices requiring GSA assistance in acquiring utility services shall assemble and furnish complete information relating to each proposed acquisition sufficiently in advance (see 41.105-1(d)) to permit a complete review by GSA.

(b) The information for review shall include–

(1) A technical description or specifications of the type, quantity, and quality of service required; and

(2) A copy of any service proposal or proposed contract.

(c) If not included in the foregoing, a copy of the fol-

lowing additional documents and data shall be furnished, if applicable:

(1) A complete copy or copies of the current published or unpublished rates of the utility supplier.

(2) The following data concerning quantity, quality, and delivery schedule of required services when new or initial services are to commence:

(i) The date initial service is required.

(ii) Data, for the first calendar year of full service, on estimated maximum demand, monthly consumption, and estimated annual cost of service and connection charges to be paid by the agency.

(iii) Known or estimated time schedule for growth to ultimate requirements.

(iv) Estimated ultimate maximum demand and ultimate monthly consumption.

(v) A simple schematic diagram or line drawing showing the meter locations and the location of the new utility facilities to be constructed by the Federal agency and the new connecting facilities to be constructed by the utility supplier to provide the new services.

(vi) Accounting and appropriation data to cover the required utility services and any connection charges required to be paid by the agency to receive such utility services.

(3) Identification of all available sources or methods of supply, the cost effectiveness of each, and a statement of the ability of each source to provide the required services, including the location and a description of each available supplier's facilities at the nearest point of service.

(4) Identification of any unusual factors affecting the acquisition.

(5) The following data concerning proposed facilities and related connection charges or costs:

(i) Proposed refundable or nonrefundable connection

charge, termination liability, or other facilities charge to be paid by the Federal agency, together with a description of the supplier's proposed facilities and estimated construction costs entering into the determination of the proposed connection charge, termination liability, or facilities charge.

(ii) The basis for the connection charge by the utility supplier.

(iii) A statement by the supplier that any proposed connection charge is not in excess of the charge that other customers would be required to pay for like facilities under similar class and condition of service.

(iv) A copy of the acquiring agency's estimate to make its own connection to the supplier's facilities, in lieu of paying the connection charge proposed by the utility supplier. In the case of proposed water and sewage contracts, the acquiring agency shall provide its estimates to construct and operate its own utility facilities in lieu of participating in a cost-sharing construction program with the proposed utility supplier.

(d) For existing utility services, the agency shall furnish the data required above under 41.107(a), (b), (c)(1), and the following additional information:

(1) A copy of the monthly bills covering the most recent 12 months.

(2) A tabulation, by months, for the most recent 12 months, showing the utility demands, consumption and charges, fuel adjustment charges, and the average monthly cost per unit of consumption.

(3) A tabulation by months, for the next 12 months showing the same data as requested in (2) above.

(4) Accounting and appropriation data to cover the costs for the continuation of utility services.

(5) A simple schematic diagram or line drawing suitable to be included in the utility services contract show-

ing the meter locations.

(6) For electric service contracts, state if the transformer(s) at the point of delivery is owned by the Federal agency or the utility supplier and if the metering is made on the primary or secondary side of such transformer(s).

41.106 Agency implementation.

Specific operating and management details such as procedures for contract assistance and review, contract format, delegations of authority, and approval thresholds are left to individual agency implementation pursuant to all appropriate statutes and regulations.

41.109 Contract clauses.

(a) The contracting officer shall insert the clause at 52.206-3, Conflicts, in solicitations and contracts for utility services.

(b) The contracting officer shall also insert in solicitations and contracts for utility services the provisions and clauses prescribed elsewhere in the FAR, as appropriate for each acquisition, depending on the conditions that are applicable.

Supreme Court, U.S.
FILED
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No. 86-1782

In The
Supreme Court of the United States
October Term, 1986

BLACK HILLS POWER AND LIGHT COMPANY, a South Dakota corporation, and SOUTH DAKOTA PUBLIC UTILIITES COMMISSION and the STATE OF SOUTH DAKOTA,
Petitioners,

vs.

CASPER W. WEINBERGER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VINCENT J. PROTSCH
(Attorney of Record)
MUMFORD, PROTSCH & PARDY
106 S. Egan
Madison, SD 57042
(605) 256-6543

Attorney for Respondent
HEARTLAND CONSUMERS POWER DISTRICT

Pandick Technologies, Inc., Chicago • (312) 236-0200

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OPINIONS BELOW

The opinion of the District Court (unreported) is set forth in Petitioner's Appendix (pages 25a-40a). The opinion of the Court of Appeals for the Eighth Circuit is reported at 808 F. 2d 665 and set forth in Petitioners' Appendix (pages 3a-22a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CITATIONS TO PERTINENT AUTHORITY

Following is a list of citations to pertinent authority, the text of some of the authority being set out verbatim in the Petitioners' Appendix pursuant to Supreme Court Rule 21.1(f) because of the lengthy nature of the provisions.

1. Fed. Reg. 16988-16991 (May 7, 1986) (reprinted in Petitioners' Appendix).

2. P.L. 99-591 Sec. 620, 100 Stat. 3341-333, (99th Cong. Oct. 30, 1986): Sec. 620: None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Federal Register 16988-16991), or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas, or steam utility services acquired by the Federal Government.

3. P.L. 99-591 Sec. 9111, 100 Stat. 3341-120 (99th Cong. Oct. 30, 1986): Sec. 9111. None of the funds appropriated or made available by this Act shall be used to implement or enforce the rule proposed on May 7, 1986 (51 Fed. Reg. 16988-16991), or section 8.304-91 of the Air Force Supplement issued on June 24, 1985.

4. Arms Services Procurement Regulation Supplement No. 5, dated as of October 1, 1974, incorporated at 48 C.F.R. Sec. 208.3 (selected portions reprinted in Petitioners' Appendix).

5. U.S. Const. Art. 1, Sec. 8, Cl. 17: Congress has the power to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of

the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

6. U.S. Const. Art. VI, Cl. 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

7. 10 U.S.C. 2301(a): The Congress finds that in order to ensure national defense preparedness, conserve fiscal resources, and enhance defense production capability, it is in the interest of the United States that property and services be acquired for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of Congress that - - (1) full and open competitive procedures shall be used by the Department of Defense in accordance with the requirements of this chapter;. .

8. 10 U.S.C. 2303(a): This chapter applies to the procurement by any of the following agencies, for its use or otherwise, of all property (other than land) and all services for which payment is to be made from appropriated funds: (1) The Department of Defense. . . . (4) The Department of the Air Force. .

9. 10 U.S.C. 2304:

(a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services - -

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency - -

(A) shall solicit sealed bids if - -

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid;

10. SDCL 49-34A-1(3) defines customer as any person contracting for or purchasing gas or electric service from a utility.

11. SDCL 49-34A-1(11) defines person as a natural person, a partnership, a private corporation, a public corporation, a municipality, an association, a cooperative whether incorporated or not, a joint stock association, a business trust, any political subdivision or agency, or two or more persons having joint or common interest.

12. SDCL 49-34A-42 provides for an electric utility's exclusive rights in assigned service area:

"Each electric utility shall have the exclusive right to provide electric service at retail at each and every location where it is serving a customer as of March 21, 1975, and to each and every present and future customer in its assigned service area and no electric utility shall render or extend electric service at retail within the assigned service area of another electric utility unless such other electric utility consents thereto in writing; provided, that any electric utility may extend its facilities through the assigned service area of another electric utility if the extension is neces-

sary to facilitate the electric utility connecting its facilities or customers within its own assigned service area."

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts are as stated in Petitioners' Petition and in the decisions of the District Court (Petitioners' Appendix at 26a-30a) and the Court of Appeals (Petitioners' Appendix at 3a-6a).

SUMMARY OF ARGUMENT

The South Dakota Public Utilities Commission directly interfered with the United States' control over the provision of electrical service with Ellsworth Air Force Base, and such interference violates the Supremacy Clause of the United States Constitution, Article VI, cl 2.

Where there is a conflict between federal and state law, federal law will preempt state law. State law in this case conflicts with federal law and the EAFB procurement official was not required to follow state law. Federal procurement law preempted South Dakota franchise area law in this case.

The Competition in Contracting Act of 1984, Pub. Law No. 98-369, 98 Stat. 1175 (July 18, 1984), 10 U.S.C. Sec. 2301(a), 2303(a), 2304(a), mandates competitive bidding except where the contracting official is allowed to exercise discretion in the procurement of property and services.

Supplement No. 5 does not mandate EAFB to purchase utility services from Black Hills. If the Department of Defense gives deference to South Dakota franchise area laws, it does so as a matter of comity rather than law.

The United States statutes and regulations applicable to the procurement of electricity at EAFB are designed to ensure active competition that the United States may receive the most advantageous contract. Competition is the rule, not the exception.

The decision of the United States Court of Appeals

for the Eighth Circuit in this case does not conflict with United States Supreme Court decisions. The Competition in Contracting Act of 1984, Pub. Law No. 98-369, 98 Stat. 1175 (July 18, 1984), renders United States v. State Corporation Commission of Virginia, 345 F. Supp. 843 (1972) moot.

The *United States was not a person* as defined in SDCL 49-34A-1(11) and, therefore, not a *customer* as defined in SDCL 49-34A-1(3). *Since the United States was not a customer* as required under SDCL 49-34A-42, Black Hills was not serving a *customer* (EAFB) as of March 21, 1975, and it did not have the exclusive right to provide electric service to EAFB.

The District Court's holding above nullifies Petitioners' claim that the federal government should abide by state franchise territory restrictions and renders the resolution of Petitioners' Question Presented for Review unnecessary.

ARGUMENT FOR DISALLOWANCE OF WRIT

I. The decision of the United States Court of Appeals for the Eighth Circuit followed settled law.

The decision of the United States Court of Appeals for the Eighth Circuit below is plainly correct and follows settled law. The Court determined that the South Dakota PUC had no authority to include the federal enclave, Ellsworth Air Force Base (EAFB), in its assigned service territories for the purpose of exerting control over sales of electric service that are consummated within the federal territory. South Dakota has no jurisdiction to prevent the United States from using competitive bidding to purchase electric service for delivery within the enclave.

By ordering the United States to contract with Black Hills based on an assigned service area, the South Dakota Public Utilities Commission has directly interfered with

the United States' control over the provision of electrical serve within EAFB. State regulation of utility service to federal installations intrudes upon the exercise of exclusive federal jurisdiction. In dealing with EAFB, a federal enclave, the United States has exclusive jurisdiction even absent conflict between state and federal regulation. The United States Supreme Court has held "the cases make clear that enclaves that meet the requirements of Art. 1, Sec. 8, Cl. 17 by its own weight, bars state regulation without specific congressional action." *Paul v. United States*, 371 U.S. 245, 253, 9 L.Ed.2d 292, 83 S.Ct. 426 (1963).

The statutes and regulations applicable to the procurement of electricity at EAFB are designed to ensure "active competition so that the United States may receive the most advantageous contract." Competitive bidding is the rule not the exception. *Paul v. United States*, supra. It is clear that federal procurement law preempted state franchise area laws for the provision of electric service to EAFB, a federal enclave. South Dakota's attempt to interfere with this clear policy is impermissible.

Petitioners' claim that Armed Services Procurement Regulations, Supplement No. 5 (ASPR-S5), require the United States to purchase electric service from Black Hills because EAFB is within Black Hills' assigned service area, is without substance. EAFB is not within Black Hills' exclusive assigned service area for the reasons stated below. Only part of the base is in Black Hills' assigned service area; the other part of the base is in the assigned area of West River Electric Association, Inc.

In procuring additional power for EAFB, the Air Force was not required to follow the guidelines of "Armed Services Procurement Regulation Supplement No. 5 (ASPR-S5)".

The ASPR No. 5 is issued for guidance of the Department of Defense personnel engaged in the procure-

ment and administration of contracts for utility services. The Forward to ASPR No. 5, (page 60a of Appendix to Petitioners' Petition for Writ of Certiorari) states:

> "This supplement is issued pursuant to 1-103.6 for the *guidance* of Department of Defense personnel engaged in the procurement and administration of contracts for utility services . . ." (emphasis added)

Supplement 5 does not mandate EAFB to purchase utility service from utilities having franchised territories. Section S5-103.2 indicates that, as *a matter of comity rather than law*, (emphasis added) the armed services will comply with state regulatory decisions concerning "accounting practices, allowability of cost pricing, and rates . . . " (Petitioners' Appendix, Page 63a) Only in these *specific* areas has the Defense Department, as a matter of policy, deferred to state regulation. None of these specific areas is involved in this case. This regulation refers to franchised territory only as an example of when competition might not be present as a practical matter; it provides no indication whatsoever that the United States is bound by local franchising law. This Regulation does not provide the kind of "clear and unambiguous" intent necessary to subject the United States to state regulation. Further, this regulation refers to those matters over which the appropriate regulatory body has taken jurisdiction. In this case the South Dakota PUC has no jurisdiction over the United States or Heartland.

Supplement 5-104.1 regulation is consistent with the clear directive federal statutes and general acquisition regulations that competition and cost factors are the rule:

> "Where competition is found to exist, competitive solicitation of proposals shall be initiated at whatever time is considered to be most advantageous to the Government."

The applicable statutes and regulations were followed in this case and competitive procurement was initiated by the United States. The Air Force's interpretation of its

own regulations to permit it to seek competition in this situation is entitled to great deference. *Zenith Radio Corp. v. United States*, 437 U. S. 443, 457-458 (1978).

The Armed Services Procurement Regulation speaks in unambiguous terms of a policy "to use that method of procurement which will be most advantageous to the government - price, quality and other factors considered." It is specifically designed to ensure active competition so that the government may receive the most advantageous contract.

The Court in the Paul case, supra, further held that the determination of whether to follow state price regulation was clearly within the discretion of the procurement official. As in the Paul case where the 1962 Act failed to show a congressional purpose to abandon competitive bidding, the statutes applicable to this case also fail to show such purpose and mandate competitive bidding. This settled principal of law applies equally to the procurement of electricity as it does to milk price regulation. Congress has reaffirmed such mandate by the passage of the Competition in Contracting Act of 1984, Pub. Law No. 98-369, 98 Stat. 1175 (July 18, 1984), 10 U.S.C. Sec. 2301(a), 2303(a), 2304(a) and subsequent sections of Chapter 137, effective for all solicitations for proposals after March 31, 1985, which act is as specific as the previous statute in providing that the Department of Defense must use competitive procedures unless in exercising its discretion it determines that competition does not exist. This law does not mandate that federal officers follow utility law in procuring electric service.

Where there is a conflict between federal and state law, state law must yield and federal law will preempt state law. *Florida Lime and Avocado Growers, Inc. v. Paul*, 83 S. Ct. 1210, 373 U.S. 132, 142-143, 10 L. Ed. 2d 248 (1963). In this case the conflict is clear: Federal procurement policy demands competition if it is available and state

law (SDCL 49-34A) attempts to eliminate competition.

Where there is any conflict between the state regulatory scheme and the federal procurement policy, the state law cannot overide the federal law. Generally, local state laws are not permitted to shape federal procurement policy. *Boeing Co. v. U. S.*, 480 F. 2d 854 (1973). Thus, the determination of whether competition exists is not one to be made based on South Dakota utility franchise law, but instead is within the sound discretion of the United States Air Force.

In this case the Petitioners do not show that the state interest dominates the federal interest. EAFB became a federal enclave ceded to the federal government a long time before the enactment of SDCL 49-34A. The United States has exclusive jurisdiction over EAFB and may contract with Heartland or others without state interference.

II. The decision of the Eighth Circuit does not conflict with previous opinions of the United States Supreme Court.

Petitioners rely on United States v. State Corporation Commission of Virginia, 345 F. Supp. 843 (1972), affirmed without opinion 409 U. S. 1094 (1973), claiming that the regulation quoted in said case is similar to that contained in Supplement 5 at S5-103.2(a). We do not share such opinion. Petitioners attempt to equate the Department of Defense regulations relating to the procurement of communication services with Supplement 5 at S5-103.2(a) that, "The Department of Defense procures utility services from industries which are, to a greater or lesser extent, regulated by federal, state and local regulatory bodies." However, they fail to continue with the next sentence of such regulation which plainly states, "Notwithstanding the other provisions of this Regulation, as to those matters over which the appropriate regulatory body has taken jurisdiction, it is the policy of the Department of Defense, *as a matter of comity rather than law*, to comply with the cur-

rent regulations, practices and decisions of that body concerning accounting practices, allowability of cost pricing, and rates, subject to judicial appeal through normal channels." (Petitioners' Appendix - Page 63a)

As stated above, Supplement 5 was issued for guidance only and such regulation refers to franchised territory only as an example when competition might not be present; as a practical matter, it provides no indication whatsoever that the United States is bound by local franchising law.

Further, when the State Corporation Commission of Virginia case, supra, was decided, the Competition in Contracting Act of 1984 was not in existence and such legislation moots said decision. This Act mandates that full and open competition procedures shall be used by the Department of Defense in the procurement of property and services. 10 U.S.C. Sec. 2301(a). It is the policy of Congress that procurement procedures for the Department of Defense and the Department of the Air Force shall be in accordance with the requirements of Chapter 137 – Procurement Generally – (1) Promote full and open competition. 10 U.S.C. Sec. 2301(b), 2304(a)(1)(A)(B).

The Eighth Circuit was correct in its determination that competition exists. Supplement No. 5 mandates that "proposals shall be solicited from all potential suppliers." S5-104.1(a) Thus the actions of the Air Force in seeking competitive bidding for overrun electricity was clearly authorized by the relevant procurement statutes and regulations.

In this case, the District Court and the Appellate Court both determined that the South Dakota state law conflicted with federal statute and policy. The State of South Dakota could not regulate indirectly (by regulating the distributor or supplier) what under the Supremacy Clause it is not permitted to regulate directly (that is, the Federal Government). The procurement official was not required to follow state law. Thus the determina-

tion of whether competition exists is not one to be made based on South Dakota utility franchise law, but instead is within the sound discretion of the Air Force. Neither the Department of Defense Communications Regulations cited by Petitioners nor Supplement No. 5 require the United States Air Force to contract with any utility and if such regulations would so require they would be in violation of United States statutory law. We do not discern a conflict between the decision of the United States Court of Appeals for the Eighth Circuit and *United States v. State Corporation Commission of Virginia, supra,* for the reasons stated herein.

III. Public Law 99-591 Sec. 9111, 100 Stat. 3341-120 and Public Law 99-591 Sec. 620, 100 Stat. 3341-333 (October 20, 1986) do not require the federal government to defer to South Dakota regulation of franchised territory or require EAFB to purchase utility service from Black Hills.

Petitioners grasp at Public Law 99-591, 100 Stat. 3341-120 and 3341-333 (October 20, 1986) Sec. 9111 and Sec. 620, and advocate that Supplement No. 5 should defer to state regulation. Public Law 99-591 merely precluded the use of appropriated funds to implement or enforce the Department of Defense proposed rule of May 7, 1986 (51 Fed. Reg. 16988-16991) or Sec. 8.304-91 of the Air Force FAR Supplement issued June 24, 1985, or any other regulation issued pursuant to statute requiring competitive bidding for electricity, gas or steam utility services acquired by the federal government. It did not rescind Supplement No. 5. but reaffirmed such supplement.

Further, the Conference Committee directed the Department of Defense "not to implement additional changes affecting the purchase of utilities until after they have been formally presented to and approved by the Committee on Appropriations of the House and Senate". 132 Cong. Rec. H10728 (daily edition, Oct. 15, 1986)

The House Report refers to the States right to regulate *retail sales* and distribution of electricity. It does not deal with wholesale sales. The District Court did not reach the question whether the sale by Heartland to EAFB was a wholesale sale or a retail sale. Heartland has vigorously maintained before the PUC and the District and Appellate Courts that its sale of electricity to EAFB was a wholesale sale. The Appellate Court noted the matter and stated:

> "For our present purpose, it is relevant to note only that, whatever label is given to the type of electric service being provided, the electricity delivered by WAPA and by the supplier of the overrun amounts is used for the same purposes. Thus, there is more than one authorized utility providing the same service."

(Petitioners' Appendix – Page 22a, note 10)

The Eighth Circuit decided that Supplement No. 5 allowed competition and, "does not require the federal government to defer to a state's regulation of franchise territories; nothing in the new legislation changes this." Petitioners' Appendix – Page 21a

The Congressional Committee reports accompanying the legislation indicate that Congress was concerned with the situation in which a federal facility that obtains all of the electricity from a single utility switches suppliers and abandons a local utility system that has already built the necessary capacity. This is not the situation in this case. Black Hills did not build additional capacity to serve EAFB. It is still serving the Renal Heights housing area. It was not serving the Main Base at the time that Heartland was awarded the contract to supply supplemental electricity to it. It does not have the whole Main Base as its assigned service area and West River Electric Association Inc. was also allocated a portion thereof as part of its assigned service area. Black Hills is neither the "sole source" supplier to EAFB nor does it have EAFB in its assigned service area. Further, the primary supplier of

electricity to EAFB is the Western Power Administration of the United States Department of Energy and the supplemental supplier of electricity at the time of the commencement of the proceedings before the South Dakota Public Utilities Commission was Heartland Consumers Power District, a public corporation and political subdivision of the State of South Dakota; Basin Electric Power Cooperative furnishes supplemental electricity to EAFB. Black Hills is not the sole source supplier to EAFB. Had Congress wanted to mandate that state franchise law governs the determination of when a utility is in a sole "source" position, it could easily have done so. However, Congress has never enacted a statute requiring that the United States purchase utility service from local franchise utilities. The Eighth Circuit was correct in holding that since federal law does not specify such procurement, the PUC could not order EAFB to contract with Black Hills for the overrun electrical service to an exclusive federal enclave. Petitioners advocate that in light of new legislation and legislative history the federal government should not ignore state franchise utilities. In this case such argument is spurious; as shown below Black Hills is not the franchised utility entitled under South Dakota law to exclusively serve EAFB as the supplemental supplier of electricity.

IV. South Dakota utility statutes do not apply to the United States.

The Eighth Circuit affirmed the District Court's decision by the application of federal law. It, therefore, did not pass upon the District Court's determination that it would not declare the contract between the United States and Heartland Consumers Power District (a public corporation and political subdivision of the State of South Dakota) void. (Petitioners Appendix – Pages 38a-39a)

The District Court applies its knowledge of local law holding that the *United States was not a person* as defined

in SDCL 49-34A-1(11) and, therefore, not a *customer* as defined in SDCL 49-34A-1(3). *Since the United States was not a customer* as required under SDCL 49-34A-42, Black Hills was not serving a *customer* (EAFB) as of March 21, 1975, and it did not have the exclusive right to provide electric service to EAFB.

The District Court's holding above nullifies Petitioners' claim that the federal government should abide by state franchise territory restrictions and renders the resolution of Petitioners' Question Presented for Review unnecessary.

CONCLUSION

For the foregoing reasons, the Petition for certiorari should be denied.

Respectfully Submitted,

VINCENT J. PROTSCH
MUMFORD, PROTSCH & PARDY
106 S. Egan
Madison, South Dakota 57042
(605) 256-6543

Attorneys for
HEARTLAND CONSUMERS POWER DISTRICT

(3)

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No. 86-1782

In the Supreme Court of the United States

OCTOBER TERM, 1987

BLACK HILLS POWER AND LIGHT COMPANY, ET AL.,
PETITIONERS

v.

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
ROBERT S. GREENSPAN
DRAKE CUTINI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTION PRESENTED

Whether the South Dakota Public Utilities Commission has the power to regulate the federal government's procurement of electricity for Ellsworth Air Force Base, a military installation of the Department of Defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 808 F.2d 665. The opinion of the district court (Pet. App. 25a-40a) is unreported. The opinion of the South Dakota Public Utilities Commission (PUC) (Pet. App. 41a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a) was entered on January 7, 1987. A petition for rehearing was denied on February 4, 1987 (Pet. App. 58a). The petition for a writ of certiorari was filed on May 4, 1987. The jurisdiction of this Court is presumably invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners erroneously cite 28 U.S.C. 2101(c) as the basis for jurisdiction (Pet. 2).

STATEMENT

This case arises out of an attempt by the PUC to prevent the United States from seeking the most advantageous contract for the purchase of electricity for Ellsworth Air Force Base (Ellsworth). The PUC purported to order the United States to buy the power in question from a particular investor-owned utility, Black Hills Power and Light Company (Black Hills) (Pet. App. 41a-56a). The district court overturned the PUC's ruling, holding, inter alia, that its attempt to regulate procurement activity of the United States violated federal law and was therefore barred under the Supremacy Clause (*id.* at 25a-40a). The court of appeals affirmed (*id.* at 1a-22a).

1. Ellsworth, a military installation of the United States Air Force, is located in parts of Meade and Pennington Counties, South Dakota. It occupies 4,856.76 acres, of which about 88% (4,261.57 acres) has been ceded by South Dakota to the exclusive jurisdiction of the United States. Apart from the Renel Heights housing area, all electrical distribution, transmission, transformation, and street lighting systems located on Ellsworth are owned, operated, and maintained by the federal government. Pet. App. 3a-4a, 28a-29a.

Black Hills, a South Dakota electric utility regulated by the PUC, provides electric service to the Renel Heights housing area.[2] That service comprises only 5.3% of Ellsworth's total electrical consumption. Prior to 1984, Ellsworth's main base electric power needs (over 94% of its consumption) had been met by the Western Area Power Administration (WAPA), an agency of the United States Department of Energy. In 1984, however, WAPA determined that it could no longer supply all of Ellsworth's

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[2] The Renel Heights electrical system, which is owned by Black Hills, is not compatible with the WAPA-owned system (Pet. App. 4a).

main base needs. Accordingly, the United States undertook to obtain this additional power through the solicitation of bids. Pet. App. 4a, 29a.

Five suppliers, including Black Hills, submitted bids. At the time it submitted its bid, Black Hills raised no challenge to the propriety of the bid procedure. The contract was awarded to Heartland Consumers Power District (Heartland), the lowest bidder, and in October 1984 Heartland and the United States entered into a one-year contract for the delivery of electricity. Pet. App. 4a. When this contract expired in October 1985, the United States again solicited bids for this electricity, and Heartland's bid was again the lowest. In 1986, the lowest bidder for the one-year contract was Basin Electric Power Cooperative, a North Dakota entity; that out-of-state entity is currently supplying the additional power to Ellsworth. Pet. App. 6a.

2. Black Hills initially challenged the award of the contract by filing a protest with the Ellsworth contracting officer. In November 1984, before that officer had responded to the protest, Black Hills filed a complaint with the PUC, claiming, inter alia, that Ellsworth is located in Black Hills' utility service territory and that Black Hills, not Heartland, should be allowed to supply electricity to Ellsworth. Pet. App. 4a, 29a.

Following a three day evidentiary hearing, the PUC held that it had jurisdiction to determine which utility company had the right to supply Ellsworth with electricity. On the merits, it ruled that because Ellsworth is located primarily in Black Hills' service area, and because a portion of Ellsworth was not ceded to the United States, Black Hills is entitled to supply all of the electricity at the base in excess of that supplied by WAPA. Pet. App. 5a, 29a, 41a-56a.

Heartland, the United States, and another party all filed appeals with the South Dakota circuit courts. The United

States subsequently removed the appeals to the United States District Court for the District of South Dakota. In addition, Black Hills filed an action in that court seeking an order directing the United States to contract with it. The district court consolidated the four cases. Pet. App. 6a.

Various motions were filed in the consolidated cases. In October 1985, the district court granted the federal government's motion to dismiss Black Hills' suit and ruled that the other cases were thereby rendered moot. The court held that under the Supremacy Clause (Art. VI, Cl. 2) the PUC has no power to order the United States to contract with a particular utility. It further held that because Ellsworth is a federal enclave, the PUC lacks jurisdiction over it. In the alternative, the court held that South Dakota's utility statutes are inapplicable to the United States. Pet. App. 6a, 25a-40a.

3. The court of appeals affirmed (Pet. App. 1a-22a) and later denied rehearing en banc (*id.* at 58a). The court held that because 88% of Ellsworth was ceded to the United States by South Dakota, the United States has exclusive jurisdiction over the base under Art. I, § 8, Cl. 17, which grants Congress exclusive jurisdiction over federal enclaves (Pet. App. 7a-8a). The court rejected the PUC's assertion that it was not attempting to exercise jurisdiction over the United States but only over the suppliers of electricity, noting that this Court had previously rejected similar contentions (*id.* at 9a). The court also rejected the PUC's assertion that it could exercise jurisdiction over Ellsworth because approximately 12% of the base was not ceded to the United States (*id.* at 10a).

In addition, the court held that Congress did not intend to allow states to regulate the procurement of electricity by federal enclaves. It observed that federal procurement law is designed to ensure competition so that the United States will receive the most advantageous contract. Pet. App.

13a-14a. The court rejected petitioners' claim that Congress evidenced a contrary intent when it enacted a rider to the 1987 appropriations bill, Act of Oct. 30, 1986, Pub. L. No. 99-591, § 9111, 100 Stat. 3341-120 [hereinafter Pub. L. No. 99-591]. The court noted that Congress was concerned about a particular situation—not present here—in which a federal facility that obtains all of its electricity from a single supplier decides to abandon that supplier after the necessary capacity has been built (Pet. App. 21a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Under the Constitution, Congress has the power "[t]o exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" (Art. I, § 8, Cl. 17). This grant of legislative power over federal enclaves "by its own weight, bars state regulation without specific congressional action." *Paul* v. *United States*, 371 U.S. 245, 263 (1963).

In the area of electricity purchases by federal enclaves, Congress has not required federal procurement officers to follow state utility franchise law. To the contrary, the applicable statutes and regulations give federal officials broad authority to procure electricity through competitive bidding. For instance, the Federal Acquisition Regulation makes clear that the general rule is the advancement of "full and open competition in soliciting offers and awarding Government contracts" (48 C.F.R. 6.101 (citing 10 U.S.C. (Supp. III) 2304)). In addition, an agency head has discretion to avoid using competitive procedures only in certain circumstances, such as when "the property or serv-

ices needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency" (10 U.S.C. (Supp. III) 2304(c)(1)) (see Pet. App. 14a-15a). Consistent with the above principles, this Court has held in various contexts that the states may not interfere with federal procurement activities. See *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963) (State of Georgia cannot prevent federal government from seeking competitive bids for intrastate shipments of household goods of federal employees); *Paul* v. *United States, supra* (invalidating California's attempt to enforce its wholesale price regulations with respect to milk sold to the United States at three military installations); *Public Utilities Comm'n* v. *United States*, 355 U.S. 534 (1958) (California tariffs for carriers cannot be applied to carriers transporting government property, since to do so would interfere with procurement officer's discretion to negotiate lower rates); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956) (where contractor submitted bid to construct certain facilities at Air Force base in Arkansas, it could not be prosecuted for undertaking project without obtaining a state license).

2. Petitioners' principal argument (Pet. 7-11) is that under Pub. L. No. 99-591, the states are entitled to regulate the procurement of electricity on federal enclaves. Petitioners recognize (Pet. 10) that this legislation was not applicable to the initial bid in question, which occurred in 1984. Nonetheless, they claim that this enactment clarifies and confirms Congress's intent. That argument lacks merit.[4]

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[4] Black Hills' reliance on Pub. L. No. 99-591 is puzzling in light of the legal position it has taken in another case. In a proceeding before the Public Service Commission of the State of Wyoming, *Tri-County Electric Ass'n* v. *Black Hills Power & Light Co.*, No. 9544, Black Hills took the view that "the Public Service Commission of Wyoming does not have jurisdiction to regulate the United States Government and

Pub. L. No. 99-591, a rider to the 1987 appropriations bill, prohibits any funds appropriated for the Department of Defense (DOD) in 1987 to be used to implement or enforce two regulatory provisions: (1) Section 8.304-91 of the Air Force Federal Acquisition Regulation Supplement (issued on June 24, 1985) [hereinafter the Air Force regulation][5] and (2) a rule proposed on May 7, 1986, by the DOD, the General Services Administration, and the National Aviation and Space Administration, 51 Fed. Reg. 16989 (to be codified at 48 C.F.R. Pt. 41) [hereinafter the May 7, 1986, proposed regulation]. The Air Force regulation and the May 7, 1986, proposed regulation provide that contracting officers must obtain utility services competitively and may not rely on state or local franchise service territories as a basis for concluding that only one supplier can provide the necessary services (see Pet. App. 18a-19a n.8). Those regulations remove the discretion of federal agencies by *requiring* the use of competitive procedures.

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determine from whom the United States is able to purchase its electric service" (Motion to Dismiss and Answer to Complaint 1). Blacks Hills was defending against a claim that it was not entitled to supply power to an Air Force site in Wyoming. Black Hills cited the court of appeals' decision below in a pleading filed in that case on April 13, 1987 (*ibid.*). It noted (*id.* at 2) that while it "believe[d] the law *ought* to be otherwise," the Eighth Circuit's decision below and the Supremacy Clause "establish the law until overturned by further court action *or by Act of Congress*" (*ibid.* (emphasis added)). Even though Wyoming is in the Tenth Circuit, and even though Pub. L. No. 99-591 had been enacted six months earlier, Black Hills relied entirely on the decision below and did not cite Pub. L. No. 99-591 or suggest that its position was undermined by any congressional enactment.

[5] The Air Force regulation, which is not published in the Federal Register, was issued by the Department of the Air Force as an internal procurement management instruction (Pet. App. 19a).

As the court of appeals explained (Pet. App. 21a (citing legislative history)), Congress's main concern in passing Pub. L. No. 99-591 involved the situation in which a federal facility that obtains its electricity from a single utility later switches to another utility and abandons its previous supplier after the required capacity has been built. In this case, Black Hills did not construct additional capacity to serve Ellsworth. Indeed, Ellsworth's principal supplier is WAPA, not Black Hills. There is no reason to think that Congress, in passing Pub. L. No. 99-591, intended to effect such a far-reaching change in federal procurement law as to require the United States to buy all of its electricity for a federal enclave from whichever utility holds a state or local franchise.

Petitioners' reliance on subsequent congressional action to support its position is particularly weak in this case[6] in light of the clear statutory and regulatory intent under preexisting law. As the court of appeals noted (Pet. App. 18a (footnote omitted)), "the actions of the Air Force in seeking competitive bidding for the overrun electricity were clearly authorized by the relevant procurement statutes and regulations."

3. Petitioners also claim (Pet. 11-17) that the court of appeals' decision conflicts with this Court's judgment in *United States* v. *State Corporation Comm'n*, 345 F. Supp. 843 (E.D. Va. 1972), aff'd, 409 U.S. 1094 (1973). That argument likewise lacks merit.

As petitioners recognize (Pet. 13), this Court's ruling in *State Corporation Comm'n* was simply an affirmance without opinion. Nonetheless, petitioners cite *Mandel* v. *Bradley*, 432 U.S. 173 (1977), and assert that this Court's summary affirmances are fully binding (Pet. 13). They fail to note that in *Mandel*, the Court stated (432 U.S. at 176)

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[6] This Court has stated that "arguments predicated upon subsequent congressional actions must be weighed with extreme care" (*Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980)).

that "a summary affirmance is an affirmance of the judgment only" and that "[s]ummary actions * * * should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *State Corporation Comm'n* involved rates, not state area franchise rules or the selection of the lowest bidder, and the government had specifically deferred to state regulation of such rates. Indeed, petitioners undermine their reliance on the Court's summary affirmance in *State Corporation Comm'n* by stating elsewhere in their petition (at 7) that the present case presents an issue "which has not been but should be settled by this Court."

4. Finally, there is no merit in petitioners' claim (Pet. 17-18; see Pet. App. 10a) that the PUC is entitled to exercise jurisdiction over Ellsworth (or at least 12% of it) because 12% of that Air Force base is on land that has not been ceded to the United States. As the court of appeals stated (*ibid.* (citing *United States* v. *State Tax Comm'n*, 412 U.S. 363 (1973)), "exclusive federal jurisdiction over eighty-eight percent of the base need not be surrendered because of the possibility that the purchase and distribution of electricity within the enclave may affect the need for electricity on the small section of the base that is still within South Dakota's jurisdiction."[7]

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[7] The court explained (Pet. App. 10a) that the overrun power supplied to Ellsworth is commingled with the WAPA-supplied power and that "it is impossible to determine what portion of the base is served by WAPA and what portion is served by the private utility."

This Court's decision in *Adams* v. *United States*, 319 U.S. 312 (1943), cited by petitioners (Pet. 17), is inapposite. That case involved questions relating to federal jurisdiction over criminal prosecutions and provides no support for petitioners' position that the PUC may exercise jurisdiction over Ellsworth because a small percentage of the land on the base has not been ceded to the federal government.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
ROBERT S. GREENSPAN
DRAKE CUTINI
Attorneys

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